No. 16-300	
Title:	**Ernst & Young LLP, et al., Petitioners** **v.** **Stephen Morris, et al.**
Docketed:	September 8, 2016
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Numbers:	(13-16599)
Decision Date:	August 22, 2016
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Sep 08 2016	Petition for a writ of certiorari filed. (Response due October 11, 2016)
Sep 21 2016	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for petitioners.
Sep 29 2016	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondents
Oct 03 2016	Brief amici curiae of National Association of Manufacturers, et al. filed. VIDED.
Oct 03 2016	Brief amicus curiae of Chamber of Commerce of the United States filed.
Oct 06 2016	Order extending time to file response to petition to and including November 14, 2016.
Oct 07 2016	Brief amicus curiae of International Association of Defense Counsel filed.
Oct 10 2016	Brief amicus curiae of Atlantic Legal Foundation filed.
Oct 11 2016	Brief amicus curiae of The Employers Group filed.
Oct 11 2016	Brief amicus curiae of The Retail Litigation Center, Inc. filed.
Oct 11 2016	Brief amicus curiae of The Business Roundtable filed.

Oct 11 2016	Brief amicus curiae of New England Legal Foundation filed.
Nov 15 2016	Order further extending time to file response to petition to and including November 21, 2016.
Nov 21 2016	Brief of respondents Stephen Morris, et al. in support of granting the petition for a writ of certiorari filed.
Dec 06 2016	Reply of petitioners Ernst & Young LLP, et al. filed.
Dec 07 2016	DISTRIBUTED for Conference of January 6, 2017.
Jan 09 2017	DISTRIBUTED for Conference of January 13, 2017.
Jan 13 2017	Petition GRANTED The petition for a writ of certiorari in Nos. 16-285 and 16-307 are granted. The cases are consolidated and a total of one hour is allotted for oral argument.
Jan 25 2017	The following briefing schedule is adopted: Petitioners in Nos. 16-285 and 16-300 and respondents in No. 16-307 will file opening and reply briefs under the schedule set forth in Rules 25.1 and 25.3. Respondents in Nos. 16-285 and 16-300 and petitioner in No. 16-307 will file response briefs under the schedule set forth in Rule 25.2. VIDED.
Feb 02 2017	Consent to the filing of amicus curiae briefs,in support of either party or of neither party, received from counsel for the petitioners Ernst & Young LLP, et al.
Feb 21 2017	The time to file the joint appendix and the opening briefs is extended to and including April 28, 2017. VIDED.
Feb 21 2017	The time to file the response briefs is extended to and including July 27, 2017. VIDED.
Apr 13 2017	Consent to the filing of amicus curiae briefs in support of either party or neither party from counsel for respondents Morris, et al.
Apr 28 2017	The time to file the joint appendix and the opening briefs is further extended to and including June 9, 2017. VIDED.
Apr 28 2017	The time to file the response briefs is further extended to and including August 9, 2017. VIDED.
Jun 09 2017	Joint appendix for Ernst & Young LLP, et al. filed. (Statement of costs filed.)

Jun 09 2017	Brief of petitioners Ernst & Young LLP, et al. filed.
Jun 16 2017	Brief amicus curiae of Bristol Farms filed. VIDED
Jun 16 2017	Brief amici curiae of Law Professors filed. VIDED.
Jun 16 2017	Brief amici curiae of National Association of Manufacturers, et al. filed. VIDED.
Jun 16 2017	Brief amicus curiae of the United States supporting Petitioners in Nos. 16-285 and 16-300 and supporting Respondents in No. 16-307 filed. VIDED.
Jun 16 2017	Brief amicus curiae of Retail Litigation Center, Inc. filed. VIDED.
Jun 16 2017	Brief amicus curiae of Chamber of Commerce of the United States of America filed. VIDED.
Jun 16 2017	Brief amicus curiae of Business Roundtable supporting Epic Systems Corp., Ernst & Young LLP, and Murphy Oil USA, Inc. filed. VIDED.
Jun 16 2017	Brief amicus curiae of The Employers Group in support of Petitioners in Nos. 16-285 and 16-300 and Respondent Murphy Oil in No. 16-307 filed. VIDED.
Jun 16 2017	Brief amicus curiae of Washington Legal Foundation in support of Petitioners in Nos. 16-285 and 16-300 and Respondent Murphy Oil USA,Inc. in No.16-307 filed. VIDED.
Jun 16 2017	Brief amicus curiae of HR Policy Association filed. VIDED.
Jun 16 2017	Brief amicus curiae of Atlantic Legal Foundation filed. VIDED.
Jun 16 2017	Brief amicus curiae of DRI-Voice of the Defense Bar filed. VIDED.
Jun 16 2017	Brief amicus curiae of International Association of Defense Counsel filed. VIDED.
Jun 16 2017	Brief amici curiae of American Staffing Association, et al. filed. VIDED.
Jun 16 2017	Brief amicus curiae of Mortgage Bankers Association and State Mortgage Lending Assocaions filed. VIDED.
Jun 16 2017	Brief amicus curiae of New England Legal Foundation filed. VIDED.

Jun 16 2017	Brief amici curiae of Council on Labor Law Equality, et al. filed. VIDED.
Jul 19 2017	SET FOR ARGUMENT on Monday, October 2, 2017. VIDED.
Aug 01 2017	Record requested from the U.S.C.A. 9th Circuit.
Aug 01 2017	Records from the U.S.C.A. 9th Circuit are electronic and located on PACER.
Aug 09 2017	Brief of respondents Stephen Morris, et al. filed. (Distributed)
Aug 10 2017	Brief amicus curiae of National Academy of Arbitrators filed. VIDED.
Aug 14 2017	CIRCULATED.
Aug 15 2017	Brief amici curiae of Ten International Labor Unions, et al. filed. VIDED. (Distributed)
Aug 16 2017	Statement of amici in support of motion of NLRB for divided argument filed. VIDED.
Aug 16 2017	Brief amicus curiae of Constitutional Accountability Center filed. VIDED. (Distributed)
Aug 16 2017	Brief amici curiae of Labor Law Professors filed. VIDED. (Distributed)
Aug 16 2017	Motion for divided argument filed by NLRB. VIDED.
Aug 16 2017	Brief amici curiae of Maryland, et al. filed. VIDED. (Distributed)
Aug 16 2017	Brief amici curiae of NAACP Legal Defense & Educational Fund, Inc., et al. filed. VIDED. (Distributed)
Aug 16 2017	Brief amici curiae of Main Street Alliance, et al. filed. VIDED. (Distributed)
Aug 16 2017	Brief amicus curiae of American Association for Justice filed. VIDED. (Distributed)
Aug 16 2017	Brief amicus curiae of Public Citizen, Inc. filed. VIDED. (Distributed)
Aug 16 2017	Brief amicus curiae of Susan Fowler filed. VIDED. (Distributed)

Aug 16 2017	Brief amicus curiae of New York Taxi Workers Alliance filed. VIDED. (Distributed)
Aug 16 2017	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sep 08 2017	Reply of petitioners Ernst & Young, et al. filed. (Distributed)
Sep 25 2017	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Sep 25 2017	Motion for divided argument filed by NLRB GRANTED.
Oct 02 2017	Argued. For petitioners in Nos. 16-285 & 16-300: Paul D. Clement, Washington, D. C.; and Jeffrey B. Wall, Principal Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For petitioner, acting as respondent, in No. 16-307: Richard F. Griffin, Jr., Washington, D. C. For respondents in Nos. 16-285 & 16-300: Daniel R. Ortiz, Charlottesville, Va. VIDED.
Oct 03 2017	Letter of NLRB regarding oral argument filed. VIDED. (Distributed)

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RECORD AND BRIEF

Supreme Court, U.S.
FILED
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16-300

No.

In the Supreme Court of the United States

ERNST & YOUNG LLP AND ERNST & YOUNG U.S. LLP,
PETITIONERS

v.

STEPHEN MORRIS AND KELLY MCDANIEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the collective-bargaining provisions of the National Labor Relations Act prohibit the enforcement under the Federal Arbitration Act of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis.

CORPORATE DISCLOSURE STATEMENT

Petitioners Ernst & Young LLP and Ernst & Young U.S. LLP are limited liability partnerships. They have no parent corporations, and no publicly held companies own 10% or more of their stock.

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In the Supreme Court of the United States

No.

ERNST & YOUNG LLP AND ERNST & YOUNG U.S. LLP,
PETITIONERS

v.

STEPHEN MORRIS AND KELLY MCDANIEL

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Ernst & Young LLP and Ernst & Young U.S. LLP respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-42a) is not yet reported. The order of the district court granting petitioner's motion to compel arbitration (App., *infra*, 43a-67a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]

Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in relevant part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title[.]

STATEMENT

This case presents a recognized and indisputably important circuit conflict concerning the interplay between two federal statutes. Under the Federal Arbitration Act (FAA), arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. Section 7 of the National Labor Relations Act (NLRA) provides that "[e]mployees shall have the right to self-organization * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. And under Section 8(a) of the NLRA, it is an unfair labor practice for an employer to "interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights. 29 U.S.C. 158(a). The question presented is whether the foregoing provisions of the NLRA prohibit the enforcement under the FAA of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis.

Respondents in this case are two of petitioners' former employees. Each signed an employment agreement that included an arbitration provision requiring all disputes with petitioners to be resolved in individual, rather than collective, arbitration. Respondents nevertheless filed a class-action lawsuit against petitioners in federal court. Petitioners moved to compel arbitration, and the district court granted the motion, holding that the arbitration provision was enforceable.

A divided panel of the Ninth Circuit reversed. Over a lengthy dissent, the majority held that the arbitration provision violated the collective-bargaining provisions of the NLRA and was thus unenforceable under the FAA. In so holding, the Ninth Circuit expressly disagreed with the prior decisions of three other courts of appeals—

including a decision of the Second Circuit that, in another case against petitioners, upheld the identical arbitration provision at issue here. The Ninth Circuit acknowledged that it was joining the minority side of a clear circuit conflict on the question presented. And petitioners are uniquely affected by that conflict, as a major employer that has been party to decisions on both sides. Because this case is the optimal vehicle for resolving the circuit conflict, the petition for a writ of certiorari should be granted.

A. Background

1. The Federal Arbitration Act guarantees that "[a] written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. As this Court has repeatedly recognized, the FAA reflects "both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011) (internal quotation marks and citations omitted).

Consistent with that understanding, courts must "rigorously enforce arbitration agreements according to their terms." *American Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013) (internal quotation marks and citation omitted). That is true in the context of agreements requiring disputes to be resolved in individual arbitration. See *Concepcion*, 563 U.S. at 345-352. And it is true in the context of agreements to arbitrate claims under federal statutory schemes, unless "the FAA's mandate has been overridden by a contrary congressional command." *CompuCredit Corp.* v. *Green-*

wood, 132 S. Ct. 665, 669 (2012) (internal quotation marks and citations omitted).

2. Section 7 of the NLRA gives employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. Under Section 8(a) of the NLRA, it is "an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in Section 7. 29 U.S.C. 158(a). The question presented in this case is whether those provisions supply the requisite congressional command to render unenforceable an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis.

B. Facts and Procedural History

1. Petitioners are Ernst & Young LLP and Ernst & Young U.S. LLP (collectively "EY"). Ernst & Young LLP is an accounting firm serving clients in the United States; Ernst & Young U.S. LLP is an affiliate of Ernst & Young LLP. Virtually all of EY's approximately 40,000 employees in the United States have signed an arbitration provision as a condition of employment. That provision specifies that "[a]ll claims, controversies or other disputes between [petitioners] and an [e]mployee that could otherwise be resolved by a court" will instead be resolved through a program of alternative dispute resolution known as the Common Ground Dispute Resolution Program. App., *infra*, 44a. Under the program, "[c]overed [d]isputes pertaining to different [e]mployees will be heard in separate proceedings"; class or collective proceedings are not permitted. *Ibid.*

Respondents Stephen Morris and Kelly McDaniel began working in EY's audit division in 2005 and 2008, respectively. See App., *infra*, 45a. Both respondents agreed to be bound by the arbitration provision. See *ibid.*

2. In 2012, respondent Morris brought suit against petitioners in the United States District Court for the Southern District of New York on behalf of a class of California employees, alleging that petitioners had misclassified the employees for purposes of overtime pay under the Fair Labor Standards Act (FLSA) and California law. Respondent McDaniel later joined the lawsuit as a plaintiff. After the case was transferred to the Northern District of California, petitioners moved to compel arbitration. Respondents did not dispute that their claims were covered by the arbitration provision; as is relevant here, they argued that the collective-bargaining provisions of the NLRA conferred a nonwaivable right to collective litigation that rendered the arbitration provision unenforceable.

The district court granted petitioners' motion to compel arbitration and dismissed the case. App., *infra*, 43a-67a. As is relevant here, the court reasoned that it was required to "enforce the instant agreement according to its terms" "[b]ecause Congress did not expressly provide [in the NLRA] that it was overriding any provision in the FAA," which embodies a "strong policy choice in favor of enforcing arbitration agreements." *Id.* at 66a-67a (internal quotation marks and citation omitted; alterations in original).

3. A divided panel of the court of appeals reversed and remanded. App., *infra*, 1a-42a.

a. The court of appeals began its analysis not with the FAA, but with the NLRA. App., *infra*, 3a-11a. Citing case law construing Section 7 of the NLRA, the court

contended that Section 7 "protects a range of concerted employee activity, including the right to seek to improve working conditions through resort to administrative and judicial forums." *Id.* at 7a (internal quotation marks and citation omitted). According to the court, Section 7 thus establishes a "substantive right" for employees "to pursue work-related legal claims, and to do so together." *Id.* at 8a, 10a. Petitioners' arbitration provision, the court of appeals determined, "prevents concerted activity by employees in arbitration proceedings, and the requirement that employees only use arbitration prevents the initiation of concerted legal action anywhere else." *Id.* at 11a. As a result, the court reasoned, the provision "interferes with a protected [Section] 7 right in violation of [Section] 8" of the NLRA and "cannot be enforced." *Ibid.*

The court of appeals then dismissed the FAA, stating that it "does not dictate a contrary result." App., *infra*, 12a. In the court's view, "[t]he illegality of the 'separate proceedings' term here has nothing to do with arbitration as a forum." *Id.* at 13a. Rather, "[i]rrespective of the forum in which disputes are resolved, employees must be able to act in the forum *together*." *Id.* at 23a. Relying on the FAA's saving clause, which provides that an arbitration agreement is enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. 2, the court concluded that petitioners' arbitration provision was prohibited by the NLRA and thus unenforceable. App., *infra*, 16a, 24a.

In reaching that conclusion, the court of appeals "recognize[d] that our sister [c]ircuits are divided on this question," and acknowledged that the majority of the courts of appeals to have considered the issue had reached a contrary conclusion. App., *infra*, 24a n.16. The court of appeals specifically rejected the mode of analysis underlying those courts' contrary conclusion,

which would require a "contrary congressional command" in a federal statute in order to override the FAA's mandate to enforce arbitration agreements. *Id.* at 17a.

b. Judge Ikuta dissented. App., *infra*, 25a-42a. She contended that the majority had adopted reasoning "directly contrary" to this Court's arbitration jurisprudence and had "join[ed] the wrong side of a circuit split." *Id.* at 25a.

Judge Ikuta began by observing that, "[c]ontrary to the majority's focus on whether the NLRA confers 'substantive rights,' in every case considering a party's claim that a federal statute precludes enforcement of an arbitration agreement, the Supreme Court begins by considering whether the statute contains an express 'contrary congressional command' that overrides the FAA." App., *infra*, 29a (citing *Italian Colors*, 133 S. Ct. at 2309; *CompuCredit*, 132 S. Ct. at 669; and *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)). Under that test, Judge Ikuta reasoned, the NLRA contained nothing "remotely close" to a "contrary congressional command" that would trump the FAA. *Id.* at 35a. The collective-bargaining provisions of the NLRA "neither mention arbitration nor specify the right to take legal action at all, whether individually or collectively." *Ibid.* Nor do those provisions "expressly preserve any right for employees to use a specific *procedural* mechanism to litigate or arbitrate disputes collectively." *Id.* at 36a. Judge Ikuta likewise found no support in the NLRA's legislative history or underlying purposes for the conclusion that the NLRA precludes enforcement of an agreement requiring disputes to be resolved in individual arbitration. See *id.* at 38a.

Judge Ikuta proceeded to reject the majority's reliance on the FAA's saving clause. See App., *infra*, 38a-41a. At the outset, Judge Ikuta noted that this Court

"does not apply the saving clause to federal statutes"; instead, unless the supposedly conflicting statute contains a congressional command contrary to the use of arbitration, it "can be harmonized with the FAA." *Id.* at 39a. She contended that the majority's reasoning was based on the erroneous premise that collective-action waivers are illegal, when, in reality, such a waiver "would be illegal only if it were precluded by a 'contrary congressional command' in the NLRA, and here there is no such command." *Id.* at 40a. Judge Ikuta further reasoned that, even if the FAA's saving clause were applicable to federal statutes, it could not save the majority's construction of the NLRA as "giving employees a substantive, nonwaivable right to classwide actions." *Ibid.* As she explained, such a purported right would "disproportionately and negatively impact arbitration agreements by requiring procedures that 'interfere[] with fundamental attributes of arbitration.'" *Ibid.* (quoting *Concepcion*, 563 U.S. at 344). In *Concepcion*, she added, the Court "expressly rejected" the reasoning behind the majority's conclusion that "the nonwaivable right to class-wide procedures [that the majority] has discerned in [Section] 7" complies with the FAA simply because it "applies equally to arbitration and litigation." *Ibid.*

Judge Ikuta concluded by observing that the majority's rule was "directly contrary to Congress's goals in enacting the FAA." App., *infra*, 40a. She noted that "lawyers are unlikely to arbitrate on behalf of individuals when they can represent a class, and an arbitrator cannot hear a class arbitration unless such a proceeding is explicitly provided for by agreement." *Id.* at 40a-41a (citation omitted). As a result, "the employee's purported nonwaivable right to class-wide procedures virtually guarantees that a broad swath of workplace claims will be litigated" rather than arbitrated. *Id.* at 41a. The ma-

jority, in other words, "exhibit[ed] the very hostility to arbitration that the FAA was passed to counteract." *Ibid.*

REASONS FOR GRANTING THE PETITION

This case presents a straightforward conflict among the courts of appeals on an important and frequently recurring question involving the interplay between two federal statutes. In the decision below, the Ninth Circuit expressly recognized that it was deepening an existing conflict on the question whether the collective-bargaining provisions of the National Labor Relations Act prohibit the enforcement of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis—an agreement that would otherwise plainly be enforceable under the Federal Arbitration Act. Five circuits have now decided the question. Three circuits have held that such agreements must be enforced pursuant to the FAA and that they do not violate the NLRA. Two circuits, including the Ninth Circuit in the decision below, have held that such agreements violate the NLRA and are thus unenforceable under the FAA.

That conflict necessitates the Court's review, and this case is the optimal vehicle in which to resolve it. The question presented is of substantial legal and practical importance. Its resolution will determine whether an enormous number of employment disputes are litigated in the federal and state courts. This case cleanly and squarely presents the question, and the parties to this case, as an employer and its employees, will be acutely affected by the outcome. Petitioners' interest is particularly strong because they employ tens of thousands of people nationwide who are subject to the arbitration provision at issue; remarkably, there is a circuit conflict

over the enforceability of that very provision, with the Second and Ninth Circuits reaching different results in cases involving EY. And uniquely among the decisions in the circuit conflict, the opinions below fully develop the arguments on both sides of the question. Because this case readily satisfies the criteria for certiorari and is the optimal vehicle for the Court's review, the petition for a writ of certiorari should be granted.

A. The Decision Below Deepens A Conflict Among The Courts Of Appeals

The Ninth Circuit's decision deepens a conflict among the courts of appeals concerning the enforceability of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis. In the decision below, the Ninth Circuit expressly recognized that conflict. See App., *infra*, 24a n.16. Other courts of appeals have done the same, see *Lewis* v. *Epic Systems Corp.*, 823 F.3d 1147, 1155, 1157-1159 (7th Cir. 2016); *Patterson* v. *Raymours Furniture Co.*, No. 15-2820, 2016 WL 4598542, at *2 (2d Cir. Sept. 2, 2016) (summary order), as have legal commentators, see, *e.g.*, Jack S. Gearan, *Ninth Circuit Court of Appeals Widens Circuit Split as to Class Action Waivers in Employee Arbitration Agreements*, Nat'l L. Rev. (Sept. 1, 2016) <tinyurl.com/gearanarticle>. The circuit conflict plainly warrants resolution by this Court.

1. As the Ninth Circuit correctly noted, see App., *infra*, 24a n.16, three courts of appeals have held that an agreement requiring an employee to arbitrate claims against an employer on an individual basis is enforceable under the FAA and does not violate the NLRA.

In the earliest of the cited decisions, *Owen* v. *Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013), an employee sued her former employer under the Fair Labor Stand-

ards Act on behalf of herself and a class of similarly situated employees. See *id.* at 1051. The Eighth Circuit held that the employer's arbitration agreement must be enforced and the suit dismissed. See *id.* at 1055. The Eighth Circuit began from the premise that courts are required to "enforce arbitration agreements according to their terms," unless there is a "contrary congressional command for another statute to override the FAA's mandate." *Id.* at 1052 (internal quotation marks and citation omitted). Because neither the NLRA nor the FLSA contained such a command, the Eighth Circuit concluded that the arbitration agreement at issue was enforceable. *Id.* at 1053-1055; see *Cellular Sales of Missouri, LLC* v. *NLRB*, 824 F.3d 772, 776 (8th Cir. 2016) (holding, "in accordance with *Owen*," that an employer did not violate the NLRA by "requiring its employees to enter into an arbitration agreement that included a waiver of class or collective actions in all forums to resolve employment-related disputes").

The Second Circuit reached the same conclusion in *Sutherland* v. *Ernst & Young LLP*, 726 F.3d 290 (2013) (per curiam). There, as here, the plaintiff worked for EY and, pursuant to the same Common Ground Dispute Resolution Program at issue here, agreed to resolve all disputes with EY via individual arbitration. See *id.* at 293-294. After the plaintiff filed a class action in federal court, EY moved to compel arbitration. See *id.* at 294. The district court denied the motion, but the Second Circuit reversed. See *id.* at 299. Like the Eighth Circuit in *Owen*, the Second Circuit began from the premise that "arbitration agreements should be enforced according to their terms unless the FAA's mandate has been overridden by a contrary congressional command." *Id.* at 295 (internal quotation marks and citation omitted). The court found no such contrary command in either the

NLRA or the FLSA, and thus enforced the arbitration agreement as written. *Id.* at 297 n.8, 298-299; see *Patterson*, 2016 WL 4598542, at *3 (following *Sutherland*).

Finally, the Fifth Circuit followed suit in *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344 (2013). Unlike *Owen* and *Sutherland*, that case arose not from an appeal in a class action by an employee, but rather on a petition for review of a decision by the National Labor Relations Board (NLRB) on a charge of unfair labor practices. See *id.* at 355. The NLRB had ruled that, by "requiring employees to refrain from collective or class claims," an arbitration agreement "infringed on the substantive rights protected by Section 7 [of the NLRA]" and therefore gave rise to a violation of Section 8(a)(1). *Ibid.* The Fifth Circuit granted the petition for review. See *id.* at 364. The court reasoned that arbitration agreements "must be enforced according to their terms," and neither the FAA's saving clause nor "another statute's contrary congressional command" precluded enforcement. *Id.* at 358. As to the saving clause, the Fifth Circuit explained that this Court's decision in *Concepcion* "leads to the conclusion that the Board's rule does not fit" within the clause. *Id.* at 359. And the court did not find a "contrary congressional command" or inherent conflict with the FAA in the text, legislative history, or purposes of the NLRA. *Id.* at 360-361. Judge Graves dissented in relevant part, arguing that the agreement was unenforceable because Section 7 conferred a substantive right to engage in class or collective actions. *Id.* at 364-365; see *Murphy Oil, U.S.A., Inc.* v. *NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015) (applying the rule of *D.R. Horton* without "repeat[ing] its analysis").

2. Before the Ninth Circuit's decision in this case, only the Seventh Circuit had adopted a contrary interpretation. In *Lewis* v. *Epic Systems Corp.*, 823 F.3d 1147

(2016), petition for cert. pending, No. 16-285 (filed Sept. 3, 2016), the Seventh Circuit held that an agreement requiring an employee to arbitrate claims against an employer on an individual basis violated the NLRA and was thus unenforceable under the FAA. See *id.* at 1161. Like the Ninth Circuit here, the Seventh Circuit started with the contention that Section 7 of the NLRA gives employees the right to pursue "concerted activities," which it construed to include the "filing a collective or class action suit." *Id.* at 1152. The Seventh Circuit reasoned that the arbitration agreement "impinges on 'Section 7 rights'" by preventing employees from "tak[ing] advantage of any collective procedures" otherwise available. *Id.* at 1155. The Seventh Circuit then proceeded to consider the FAA, concluding that the FAA did not conflict with the NLRA because "the provision at issue is unlawful under Section 7" and thus "meets the criteria of the FAA's saving clause for nonenforcement." *Id.* at 1157.

Unlike the Ninth Circuit's decision here, the Seventh Circuit's decision was unanimous. And while the Seventh Circuit recognized that it was creating a circuit conflict, it summarily rejected the Fifth Circuit's reasoning and dismissed the Second and Eighth Circuits' opinions altogether, asserting that they had not "engaged substantively with the relevant arguments." 823 F.3d at 1159.

Particularly in the wake of the Ninth Circuit's decision in this case, there can be no doubt that there is a substantial circuit conflict that is ripe for the Court's resolution. Further review is therefore warranted.

B. The Decision Below Was Incorrect

Further review is also warranted because the decision below was incorrect. The majority below followed the wrong mode of analysis, which unsurprisingly led it to the wrong result.

1. As this Court has repeatedly stated, the FAA embodies "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). Consistent with that policy, the Court has held, across a variety of contexts, that arbitration agreements must be enforced according to their terms. See, *e.g.*, *Italian Colors*, 133 S. Ct. at 2309; *Concepcion*, 563 U.S. at 339; *Shearson/American Express Inc.* v. *McMahon*, 482 U.S. 220, 225-227, 238-242 (1987).

The foregoing principle applies "even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command." *CompuCredit*, 132 S. Ct. at 669 (internal quotation marks and citation omitted). The party challenging the arbitration agreement has the burden of showing that "Congress intended to preclude a waiver of the judicial forum." *Gilmer*, 500 U.S. at 26. Indicia of such an intention "will be discoverable in the text of the [statute], its legislative history, or an inherent conflict between arbitration and the [statute's] underlying purposes." *Ibid.* (internal quotation marks omitted). Regardless of the source, however, Congress must demonstrate its intent to supersede the FAA with "clarity." *CompuCredit*, 132 S. Ct. at 672. And as is generally the case, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25.

2. The Ninth Circuit erred at the outset by refusing to follow this Court's mode of analysis and evaluate

whether the NLRA supplies a "contrary congressional command" overriding the FAA's instruction to enforce arbitration agreements according to their terms. App., *infra*, 17a. If it had done so, it would have found that the NLRA contains no congressional command contrary to collective-action waivers. See *id.* at 34a-38a (Ikuta, J., dissenting).

To begin with, the collective-bargaining provisions of the NLRA "neither mention arbitration nor specify the right to take legal action at all, whether individually or collectively." App., *infra*, 35a (Ikuta, J., dissenting). While Section 7 gives employees the right to "engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U.S.C. 157, it contains no "command" concerning arbitration, much less the kind of "express contrary congressional command" that this Court has indicated would unseat the FAA's presumption that arbitration agreements should be enforced according to their terms. App., *infra*, 29a-31a (Ikuta, J., dissenting) (internal quotation marks and citation omitted).

As Judge Ikuta noted in her dissenting opinion, this Court has found that much clearer statutory language still lacked the kind of clear congressional command necessary to nullify an arbitration agreement. See App., *infra*, 29a-33a. For example, in *CompuCredit*, the Court considered language in the Credit Repair Organizations Act (CROA) that plaintiffs argued precluded consumers from entering an arbitration agreement that waived their right to litigate in a judicial forum. See 132 S. Ct. at 669. The plaintiffs cited language in the CROA that required businesses to tell consumers that "[y]ou have a right to sue," 15 U.S.C. 1679c(a), and that provided that "[a]ny waiver by any consumer of any protection provided by or any right of the consumer" was void and could

"not be enforced by any Federal or State court," 15 U.S.C. 1679f(a). See 132 S. Ct. at 669. Despite that language, the Court held that Congress did not intend to prevent arbitration of claims under CROA. See *id.* at 672-673. If Congress had so intended, "it would have done so in a manner less obtuse than what respondents suggest." *Id.* at 672. The Court gave examples of what sufficiently clear congressional commands look like:

> "No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section."
>
> "Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy."

Ibid. (quoting 7 U.S.C. 26(n)(2) and 15 U.S.C. 1226(a)(2)). Nothing in the language of the NLRA establishes congressional intent with remotely similar clarity.

The NLRA's legislative history similarly lacks any indication of a congressional command precluding courts from enforcing collective-action waivers according to their terms. Notably, in enacting the NLRA, "Congress did not discuss the right to file class or consolidated claims against employers"; as a result, "the legislative history also does not provide a basis for a congressional command to override the FAA." App., *infra*, 37a (Ikuta, J., dissenting) (citation omitted).

Nor is there any conflict between collective-action waivers and the NLRA's underlying purposes. See App., *infra*, 37a (Ikuta, J., dissenting). The NLRA may give

employees a right to bargain collectively, but "nothing in the NLRA suggests that this protection includes the right to resolve disputes using a particular legal procedure." *Ibid.* In short, because the NLRA does not contain the requisite "contrary congressional command," the Ninth Circuit should have enforced petitioners' arbitration agreement according to its terms. *CompuCredit*, 132 S. Ct. at 669.

3. The majority below used a different mode of analysis to reach a contrary conclusion. It first concluded that the NLRA gives employees a substantive right to pursue legal claims collectively. See App., *infra*, 3a-11a. It then considered whether the right it found in the NLRA could be reconciled with the FAA and concluded that it could based on the FAA's saving clause, which provides that an arbitration agreement may be invalidated "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2; see App., *infra*, 14a, 17a. The majority reasoned that, because the NLRA confers a substantive right to engage in collective litigation, a contract purporting to waive that right would be illegal and thus invalid under the FAA's saving clause. See *id.* at 15a-18a.

The majority's mode of analysis simply cannot be reconciled with this Court's arbitration jurisprudence. The majority expressly declined to search for a "contrary congressional command" and ignored the presumption in favor of arbitration by attempting to reconcile the NLRA and the FAA on an equal footing. See App., *infra*, 17a. But this Court's arbitration decisions require a different approach. See App., *infra*, 29a (Ikuta, J., dissenting). If the majority's approach were correct, the FAA would yield any time an arbitration agreement could conflict with another federal statute. See *id.* at 39a-40a.

The majority's understanding of the FAA's saving clause is also inconsistent with this Court's decision in *Concepcion*. There, the Court explained that, "when a doctrine normally thought to be generally applicable * * * [is] applied in a fashion that disfavors or interferes with arbitration," it does not trigger the saving clause. *Concepcion*, 563 U.S. at 341. The Court determined that a defense that precludes the waiver of class or collective arbitration is not generally applicable because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344. In the same way, the majority's approach here effectively "condition[s] enforcement of arbitration on the availability of class procedure," *Italian Colors*, 133 S. Ct. at 2312, and thus cannot be squared with *Concepcion*. In rejecting the reasoning of *Concepcion* and this Court's other arbitration decisions, the majority erred and "exhibit[ed] the very hostility to arbitration that the FAA was passed to counteract." App., *infra*, 41a (Ikuta, J., dissenting).

C. The Question Presented Is Exceptionally Important And Warrants Review In This Case

1. This case presents a critical question with significant ramifications for employers and employees alike. The use of arbitration in employment agreements is widespread—and for good reason. Arbitration allows the parties to design their own "efficient, streamlined procedures tailored to the type of dispute" at issue. *Concepcion*, 563 U.S. at 344. It provides "expeditious results." *Preston* v. *Ferrer*, 552 U.S. 346, 357-359 (2008). And it "reduc[es] the cost" of resolving disputes. *Concepcion*, 563 U.S. at 345. Accordingly, as the NLRB has recognized, "employers and employees alike may derive

significant advantages from arbitrating claims": "employers have a legitimate interest in controlling litigation costs, and employees too can benefit from the relative simplicity and informality of resolving claims before arbitrators." NLRB General Counsel Memo. No. 10-06 (June 16, 2010).

The Ninth Circuit's approach "effectively cripples the ability of employers and employees to enter into" these salutary agreements. App., *infra*, 27a (Ikuta, J., dissenting). A ban on the enforcement of agreements such as the one at issue here will not lead to more collective *arbitration*, unless employers expressly agree to allow it. See *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 559 U.S. 662, 685-687 (2010). And that is unlikely, because "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Concepcion*, 563 U.S. at 348. Nor are plaintiffs' attorneys likely to "arbitrate on behalf of individuals when they can represent a class" in federal or state court. App., *infra*, 40a (Ikuta, J. dissenting). The result, as Judge Ikuta explained in her dissenting opinion, is that "a broad swath of workplace claims will be litigated" instead of arbitrated as the parties agreed. *Id.* at 41a. That outcome is flatly inconsistent with the FAA's goal of promoting the use of arbitration.

If there were any doubt that the question presented here has sweeping legal and practical ramifications, the sheer volume of commentary would allay it. See, *e.g.*, Albina Gasanbekova, *Building A Circuit Split: Updating Moves by the NLRB on Class Waivers*, 34 Alternatives to High Cost Litig. 60 (2016); Michael Hoenig & Linda M. Brown, *Arbitration and Class Action Waivers Under* Concepcion*: Reason and Reasonableness Deflect*

Strident Attacks, 68 Ark. L. Rev. 669 (2015); Stephanie Greene & Christine Neylon O'Brien, *The NLRB v. the Courts: Showdown Over the Right to Collective Action in Workplace Disputes*, 52 Am. Bus. L.J. 75 (2015); Note, *Deference and the Federal Arbitration Act: The NLRB's Determination of Substantive Statutory Rights*, 128 Harv. L. Rev. 907 (2015); Catherine L. Fisk, *Collective Actions and Joinder of Parties in Arbitration: Implications of* D.R. Horton *and* Concepcion, 35 Berkeley J. Emp. & Lab. L. 175 (2014); James R. Montgomery, *'Horton and the Who': Determining Who Is Affected by the Emerging Statutory Battle Between the FAA and Federal Labor Law*, 2014 J. Disp. Resol. 363; Charles A. Sullivan & Timothy P. Glynn, Horton *Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 Ala. L. Rev. 1013 (2013). Few cases come to the Court with such a substantial chorus highlighting the importance of the issue and the need for the Court's intervention.

2. This case is the optimal vehicle for considering and resolving the question presented. To check the obvious boxes: the question was pressed below, fully briefed by the parties, and passed on by the court of appeals as the sole basis for its decision. There are thus no impediments to the Court's resolution of the question presented in this case.

Beyond that, however, this case presents the question not only squarely but in depth. Uniquely among the decisions in the circuit conflict, the opinions below fully develop the arguments on both sides of the question. They debate whether to begin from the proposition that "employees have the right to pursue work-related legal claims together," App., *infra*, 3a, or the proposition that "agreements to arbitrate are valid, irrevocable, and enforceable," *id.* at 27a (Ikuta, J., dissenting) (internal quo-

tation marks and citation omitted). They extensively analyze this Court's arbitration-related case law. Compare *id.* at 12a-24a (majority opinion) (discussing, *inter alia*, *CompuCredit*, *Italian Colors*, and *Gilmer*), with *id.* at 27a-34a (Ikuta, J., dissenting) (similar). And they address the relevance of the FAA's saving clause, compare *id.* at 16a-18a (majority opinion), with *id.* at 38a-41a (Ikuta, J., dissenting), and the policy implications of the majority's rule, compare *id.* at 22a (majority opinion), with *id.* at 41a-42a (Ikuta, J., dissenting). No other decision has so clearly and thoroughly framed the competing arguments.

In addition, this case presents the paradigmatic context in which controversies about the validity of arbitration agreements arise—a private lawsuit brought by employees against their employer, in which the employer seeks to compel arbitration. See, *e.g.*, *Patterson*, *supra*; *Lewis*, 823 F.3d at 1147; *Sutherland*, 726 F.3d at 290; *Owen*, 702 F.3d at 1050; *Totten* v. *Kellogg Brown & Root, LLC*, 152 F. Supp. 3d 1243, 1254 (C.D. Cal. 2016); *Nanavati* v. *Adecco USA, Inc.*, 99 F. Supp. 3d 1072, 1077 (N.D. Cal. 2015); *Dixon* v. *NBCUniversal Media, LLC*, 947 F. Supp. 2d 390, 403 n.11 (S.D.N.Y. 2013). As a result, the parties to this case, an employer and its employees, are best situated to represent the two opposing viewpoints on the question presented under the FAA and the NLRA. To the extent the NLRB has taken a position on the issue, moreover, it participated in this case before the Ninth Circuit as an amicus curiae, and would presumably continue to do so in this Court if certiorari is granted.

Of particular note, moreover, the circuit conflict at hand affects petitioners in a particularly acute way, making this case a uniquely compelling vehicle in which to resolve the question presented. EY is one of the Na-

tion's largest professional-services firms, with approximately 40,000 employees in every corner of the country. Virtually all of those employees have signed the arbitration provision at issue here as a condition of employment. As noted above, however, the Second and the Ninth Circuits have reached different results concerning the very same arbitration provision, with the Second Circuit holding that it is valid and enforceable and the Ninth Circuit holding that it is not. Compare App., *infra*, 24a, with *Sutherland*, 726 F.3d at 297 n.8. As matters currently stand, therefore, EY's ability to enforce its uniform nationwide arbitration provision depends on where a given employee is located (or where the employee files suit). Petitioners thus have a particularly strong interest in defending the validity of agreements requiring an employee to arbitrate claims against an employer on an individual basis. In addition, should the Court grant review in this case, it will have the luxury of knowing that it is comparing apples to apples, considering an arbitration agreement that has divided the circuits without any concern about complicating peculiarities in the language (or method of adoption) of a less widely used agreement.

In sum, the Ninth Circuit's decision deepens a widely recognized conflict—and, indeed, creates a conflict specific to petitioners—on the question whether the National Labor Relations Act prohibits the enforcement under the Federal Arbitration Act of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis. That question is undeniably important and recurring, and this case is the optimal vehicle for considering it. The Court should grant the petition for certiorari and resolve a circuit conflict that is affecting employers and employees across the country.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-16599

STEPHEN MORRIS; KELLY MCDANIEL, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

v.

ERNST & YOUNG, LLP; ERNST & YOUNG U.S., LLP,
Defendants-Appellees.

Filed: August 22, 2016

Before: THOMAS, Chief Judge, and IKUTA and HURWITZ, Circuit Judges.

OPINION

THOMAS, Chief Judge.

In this case, we consider whether an employer violates the National Labor Relations Act by requiring employees to sign an agreement precluding them from bringing, in any forum, a concerted legal claim regarding wages, hours, and terms and conditions of employment. We conclude that it does, and vacate the order of the district court compelling individual arbitration.

I

Stephen Morris and Kelly McDaniel worked for the accounting firm Ernst & Young. As a condition of employment, Morris and McDaniel were required to sign agreements not to join with other employees in bringing legal claims against the company. This "concerted action waiver" required employees to (1) pursue legal claims against Ernst & Young exclusively through arbitration and (2) arbitrate only as individuals and in "separate proceedings." The effect of the two provisions is that employees could not initiate concerted legal claims against the company in any forum—in court, in arbitration proceedings, or elsewhere.

Nonetheless, Morris brought a class and collective action against Ernst & Young in federal court in New York, which McDaniel later joined. According to the complaint, Ernst & Young misclassified Morris and similarly situated employees. Morris alleged that the firm relied on the misclassification to deny overtime wages in violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C.A. § 201 *et seq.*, and California labor laws.

The case was eventually transferred to the Northern District of California. There, Ernst & Young moved to compel arbitration pursuant to the agreements signed by Morris and McDaniel. The court ordered individual arbitration and dismissed the case. This timely appeal followed.

Morris and McDaniel argue that their agreements with the company violate federal labor laws and cannot be enforced. They claim that the "separate proceedings" clause contravenes three federal statutes: the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq.*,

the Norris LaGuardia Act, 29 U.S.C. § 101 *et seq.*, and the FLSA. Relevant here, Morris and McDaniel rely on a determination by the National Labor Relations Board ("NLRB" or "Board") that concerted action waivers violate the NLRA. *D.R. Horton*, 357 NLRB No. 184 (2012) ("*Horton I*"), *enf. denied* 737 F.3d 344 (5th Cir. 2013) ("*Horton II*"); *see also Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014) ("*Murphy Oil I*"), *enf. denied* 808 F.3d 1013 (5th Cir. 2015) ("*Murphy Oil II*").

We have jurisdiction under 28 U.S.C. § 1331 and review the district court's order to compel arbitration *de novo*. *Balen v. Holland Am. Line, Inc.*, 583 F.3d 647, 652 (9th Cir. 2009).

II

This case turns on a well-established principle: employees have the right to pursue work-related legal claims together. 29 U.S.C. § 157; *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978). Concerted activity—the right of employees to act *together*—is the essential, substantive right established by the NLRA. 29 U.S.C. § 157. Ernst & Young interfered with that right by requiring its employees to resolve all of their legal claims in "separate proceedings." Accordingly, the concerted action waiver violates the NLRA and cannot be enforced.

A

The Supreme Court has "often reaffirmed that the task of defining the scope of [NLRA rights] 'is for the Board to perform in the first instance as it considers the wide variety of cases that come before it.'" *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984) (quoting *Eastex*, 437 U.S. at 568). "[C]onsiderable deference" thus

attaches to the Board's interpretations of the NLRA. *Id.* Thus, we begin our analysis with the Board's treatment of similar contract terms.

The Board has concluded that an employer violates the NLRA

> when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial.

Horton I, 357 NLRB No. 184, slip op. at 1.

The Board's determination rested on two precepts. First, the Board interpreted the NLRA's statutory right "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection" to include a right "to join together to pursue workplace grievances, including through litigation." *Id.* at 2 (interpreting 29 U.S.C. § 157). Second, the Board held that an employer may not circumvent the right to concerted legal activity by requiring that employees resolve all employment disputes individually. *Id.* at 4-5, 13 (interpreting 29 U.S.C. § 158). In other words, employees must be able to initiate a work-related legal claim together in some forum, whether in court, in arbitration, or somewhere else. *Id.* A concerted action waiver prevents this: employees may only

resolve disputes in a single forum—here, arbitration—and they may never do so in concert. *Id.*[1]

The Supreme Court has instructed us to review the Board's interpretations of the NLRA under the familiar two-step framework set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 & n.9 (1984). *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992) (*Chevron* framework applies to NLRB constructions of the NLRA). The Board's reasonable interpretations of the NLRA command deference, while the Board's remedial preferences and interpretations of unrelated statutes do not. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 143-44 (2002).[2]

Under *Chevron*, we first look to see "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. In analyzing Congressional intent, we employ the "traditional tools of statutory construction." *Id.* at 843 & n. 9. We not only look at

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[1] The contract in *Horton I* required all claims to be heard in arbitration and required the arbitrator to "hear only Employee's individual claims." *Horton I*, 357 NLRB No. 184, slip op. at 1. It also contained an express waiver of class or collective proceedings in arbitration. *Id.* Ernst & Young concedes that the "separate proceedings" term in the exclusive arbitration agreements here has the same effect.

[2] The Board has both rulemaking and adjudicative powers, 29 U.S.C. § 156, § 160, and it may authoritatively interpret the NLRA through either process. *NLRB v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267, 294 (1974) (concluding that the Board may announce "new principles in an adjudicative proceeding"). Our analysis under *Chevron* does not extend to the Board's interpretation of statutes it does not administer, to the Board's interpretation of Supreme Court cases, or to the Board's remedial preferences.

the precise statutory section in question, but we also analyze the provision in the context of the governing statute as a whole, presuming congressional intent to create a "'symmetrical and coherent regulatory scheme.'" *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995)). If we conclude that "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43.

In this case, we need go no further. The intent of Congress is clear from the statute and is consistent with the Board's interpretation.

To determine whether the NLRA permits a total waiver on concerted legal activity by employees, we begin with the words of the statute. The NLRA establishes the rights of employees in § 7. It provides that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]

29 U.S.C. § 157.

Section 8 enforces these rights by making it "an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7]." 29 U.S.C. § 158; *see NLRB v. Bighorn Beverage*, 614 F.2d 1238, 1241 (9th Cir. 1980)

(describing relationship between sections; § 7 establishes rights and § 8 enforces them).

Section 7 protects a range of concerted employee activity, including the right to "seek to improve working conditions through resort to administrative and judicial forums." *Eastex*, 437 U.S. at 566; *see also City Disposal Sys.*, 465 U.S. at 835 ("There is no indication that Congress intended to limit [§ 7] protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way."). Therefore, "a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is 'concerted activity' under § 7 of the National Labor Relations Act." *Brady v. NFL*, 644 F.3d 661, 673 (8th Cir. 2011). So too is the "filing by employees of a labor related civil action." *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976). Courts regularly protect employees' right to pursue concerted work-related legal claims under § 7. *Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1189 (D.C. Cir. 2000) ("filing a civil action by a group of employees is protected activity" under § 7) (internal quotation marks and citation omitted); *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973) (same).

It is also well-established that the NLRA establishes the right of employees to act in *concert*: "Employees shall have the right . . . to engage in other *concerted* activities for the purpose of *collective* bargaining or other *mutual* aid and protection." 29 U.S.C. § 157 (emphasis added). Concerted action is the basic tenet of federal labor policy, and has formed the core of every significant federal labor statute leading up to the NLRA. *City Disposal Sys.*, 465 U.S. at 834-35 (describing history of the

term "concert" in statutes affecting federal labor policy). Taken together, these two features of the NLRA establish the right of employees to pursue work-related legal claims, and to do so together. The pursuit of a concerted work-related legal claim "clearly falls within the literal wording of § 7 that '[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975) (quoting 29 U.S.C. § 157). The intent of Congress in § 7 is clear and comports with the Board's interpretation of the statute.[3]

The same is true for the Board's interpretation of § 8's enforcement provisions. Section 8 establishes that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157." 29 U.S.C. § 158. A "separate proceedings" clause does just that: it prevents the initiation of any concerted work-related legal claim, in any forum. Preventing the exercise of a § 7 right strikes us as "interference" within the meaning of § 8. Thus, the Board's determination that a concerted action waiver violates § 8 is no surprise. And an employer violates § 8 a second time by conditioning

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[3] *Eastex* clarifies that concerted activity extends to judicial forums, and it does not limit concerted activity to any particular vehicle or mechanism. 437 U.S. at 556 & n.15. Further, we reject the argument that the NLRA cannot protect a right to concerted legal action because Rule 23 class actions did not exist until after the NLRA was passed. *See City Disposal Sys.*, 465 U.S. at 835 (noting that the NLRA has forward-looking view of § 7 protections). Rule 23 is not the source of employee rights; the NLRA is. *Eastex* settles this question by expressly including concerted legal activity within the set of protected § 7 activities. 437 U.S. at 566.

employment on signing a concerted action waiver. *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 364 (1940) ("Obviously employers cannot set at naught the National Labor Relations Act by inducing their workmen to agree" to waive the statute's substantive protections); *see Retlaw Broad. Co.*, 310 NLRB no. 160, slip op. at 14 (1993), *enforced*, 53 F.3d 1002 (9th Cir. 1995) (section 8 prohibits conditioning employment on waiver of § 7 right).[4] Again, we need not proceed to the second step of *Chevron* because the intent of Congress in § 8 is clear and matches the Board's interpretation.

Section 8 has long been held to prevent employers from circumventing the NLRA's protection for *concerted* activity by requiring employees to agree to *individual* activity in its place. *National Licorice*, for example, involved a contract clause that discouraged workers from redressing grievances with the employer "in any way except personally." 309 U.S. at 360. This clause violated the NLRA. *Id.* at 361. The individual dispute resolution practice envisioned by the contract, and required by the employer, represented "a continuing means of thwarting the policy of the Act." *Id.*

Similarly, *N.L.R.B. v. J.H. Stone & Sons*, 125 F.2d 752 (7th Cir. 1942), concluded that individual dispute resolution requirements nullify the right to concerted activity established by § 7:

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[4] In contrast, there was no § 8 violation in *Johnmohammadi v. Bloomingdale's, Inc.* because the employee there could have opted out of the individual dispute resolution agreement and chose not to. 755 F.3d 1072, 1076 (9th Cir. 2014).

> By the clause in dispute, the employee bound himself to negotiate any differences with the employer and to submit such differences to arbitration. The result of this arbitration was final. Thus the employee was obligated to bargain individually and, in case of failure, was bound by the result of arbitration. This is the very antithesis of collective bargaining.

Id. at 756.

The "separate proceedings" clause in this case is no different. Under the clause, the employee is obligated to pursue work-related claims individually and, no matter the outcome, is bound by the result. This restriction is the "very antithesis" of § 7's substantive right to pursue concerted work-related legal claims. For the same reason, the Seventh Circuit recently concluded that "[a] contract that limits Section 7 rights that is agreed to as a condition of continued employment qualifies as 'interfer[ing] with' or 'restrain[ing] . . . employees in the exercise' of those rights in violation of Section 8(a)(1)." *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1155 (7th Cir. 2016). Indeed, § 7 rights would amount to very little if employers could simply require their waiver.

In sum, the Board's interpretation of § 7 and § 8 is correct. Section 7's "mutual aid or protection clause" includes the substantive right to collectively "seek to improve working conditions through resort to administrative and judicial forums." *Eastex*, 437 U.S. at 566; *accord City Disposal Sys.*, 465 U.S. at 834-35. Under § 8, an employer may not defeat the right by requiring employees to pursue all work-related legal claims individually.

See J.I. Case Co. v. NLRB, 321 U.S. 332, 337 (1944) ("Individual contracts . . . may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act"). The NLRA is unambiguous, and there is no need to proceed to the second step of *Chevron*.[5]

Applied to the Ernst & Young contract, § 7 and § 8 make the terms of the concerted action waiver unenforceable. The "separate proceedings" clause prevents concerted activity by employees in arbitration proceedings, and the requirement that employees only use arbitration prevents the initiation of concerted legal action anywhere else. The result: interference with a protected § 7 right in violation of § 8. Thus, the "separate proceedings" terms in the Ernst & Young contracts cannot be enforced.[6]

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[5] Because congressional intent can be ascertained employing the usual tools of statutory construction, we do not proceed to step two of the *Chevron* analysis. However, if that analysis were undertaken, the only conclusion could be that "[t]he Board's holding is a permissible construction of 'concerted activities for . . . mutual aid or protection' by the agency charged by Congress with enforcement of the Act." *Weingarten*, 420 U.S. at 260 (quoting 29 U.S.C. § 157).

[6] Ernst & Young also argues for the first time on appeal that there is no evidence that Morris and McDaniel are statutory employees covered by the NLRA. This argument was not adequately raised before the district court and is therefore waived. *See Solis v. Matheson*, 563 F.3d 425, 437 (9th Cir. 2009). Likewise, we also reject the claim that the Board's interpretations of the NLRA in *Horton I* and *Murphy Oil I* do not apply here because there was no NLRB proceeding or finding of an unfair labor practice. We agree with the agency's interpretation of the NLRA because it gives effect to Congress's intent. Our agreement has nothing to do with the procedural history of the cases from which the Board's interpretation arose.

B

The Federal Arbitration Act ("FAA") does not dictate a contrary result. The "separate proceedings" provision in this case appears in an agreement that directs employment-related disputes to arbitration. But the arbitration requirement is not the problem. The same provision in a contract that required court adjudication as the exclusive remedy would equally violate the NLRA. The NLRA obstacle is a ban on initiating, in any forum, concerted legal claims—not a ban on arbitration.

The FAA "was enacted in 1925 in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). In relevant part, it provides that,

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. The Act requires courts to "place arbitration contracts 'on equal footing with all other contracts,'" *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)), and to "enforce them according to their terms," *Concepcion*, 563 U.S. at 339. Not all contract terms receive blanket enforcement under the FAA, however. The FAA's

> saving clause permits agreements to arbitrate to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability," but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.

Id. (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). Accordingly, when a party raises a defense to the enforcement of an arbitration provision, a court must determine whether the defense targets arbitration contracts without "due regard . . . to the federal policy favoring arbitration." *DIRECTV*, 136 S. Ct. at 471 (quoting *Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989)).

The contract defense in this case does not "derive [its] meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339. An agreement to arbitrate work-related disputes does not conflict with the NLRA. Indeed, federal labor policy favors and promotes arbitration. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

The illegality of the "separate proceedings" term here has nothing to do with arbitration as a forum. It would equally violate the NLRA for Ernst & Young to require its employees to sign a contract requiring the resolution of all work-related disputes *in court* and in "separate proceedings." The same infirmity would exist if the contract required disputes to be resolved through casting lots, coin toss, duel, trial by ordeal, or any other dispute resolution mechanism, if the contract (1) limited resolution to that mechanism and (2) required separate

individual proceedings. The problem with the contract at issue is not that it requires arbitration; it is that the contract term defeats a substantive federal right to pursue concerted work-related legal claims.[7]

When an illegal provision not targeting arbitration is found in an arbitration agreement, the FAA treats the contract like any other; the FAA recognizes a general contract defense of illegality.[8] 9 U.S.C. § 2; *Concepcion*, 563 U.S. at 339. The term may be excised, or the district court may decline enforcement of the contract altogether. *See* 19 Richard Lord, 8 *Williston on Contracts* § 19:70 (4th ed. 1990) ("Illegal portions of a contractual agreement may be severed if the illegal provision is not central to the parties' agreement."); *see also Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 433 (9th Cir. 2015) ("'generally applicable' contract defense" is "preserved by § 2's saving clause").

Crucial to today's result is the distinction between "substantive" rights and "procedural" rights in federal law. The Supreme Court has often described rights that

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[7] In contrast, the arbitration cases cited by the dissent and Ernst & Young involved litigants seeking to avoid an arbitral forum—their defenses targeted arbitration. Here, Morris and McDaniel seek to exercise substantive rights guaranteed by federal statute in *some* forum, including in arbitration.

[8] *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), is not to the contrary. Under *Stolt*, an arbitrator may not add to the terms of an arbitration agreement, and therefore may not order class arbitration unless the contract provides for it *Id.* at 684. This does not require a court to enforce an illegal term. Nor would *Stolt* prevent the district court, on remand, from severing the "separate proceedings" clause to bring the arbitration provision into compliance with the NLRA.

are the essential, operative protections of a statute as "substantive" rights. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). In contrast, procedural rights are the ancillary, remedial tools that help secure the substantive right. *See id.*; *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 671 (2012) (describing difference between statute's "guarantee" and provisions contemplating ways to enforce the core guarantee).[9]

The difference is key, because substantive rights cannot be waived in arbitration agreements. This tenet is a fundamental component of the Supreme Court's arbitration jurisprudence: "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi*, 473 U.S. at 628. Thus, if a contract term in an arbitration agreement "operate[s] . . . as a prospective waiver of a party's right to pursue statutory remedies for [substantive rights], we would have little hesitation in condemning the agreement." *Id.* at 637 n.19; *see also Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013); *Green Tree Fin. Corp.-Al. v. Randolph*, 531 U.S. 79, 90 (2000); *Gilmer*, 500 U.S. at 28; *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 240, (1987).

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[9] The Age Discrimination in Employment Act ("ADEA"), for example, establishes a primary, substantive right against age discrimination. 29 U.S.C. § 623; *Gilmer*, 500 U.S. at 27. It provides for collective proceedings as one way, among many, to secure that right. 29 U.S.C. § 626 (providing for "Recordkeeping, investigation, and enforcement" of the ADEA, including collective legal redress).

The FAA does not mandate the enforcement of contract terms that waive substantive federal rights. Thus, when an arbitration contract professes the waiver of a substantive federal right, the FAA's saving clause prevents a conflict between the statutes by causing the FAA's enforcement mandate to yield. *See Epic Sys.*, 823 F.3d at 1159 ("Because the NLRA renders [the defendant's] arbitration provision illegal, the FAA does not mandate its enforcement.").[10]

The rights established in § 7 of the NLRA—including the right of employees to pursue legal claims together—are substantive. They are the central, fundamental protections of the Act, so the FAA does not mandate the enforcement of a contract that alleges their waiver. The text of the Act confirms the central role of § 7: that section establishes the "*Right* of employees as to organization." 29 U.S.C. § 157 (emphasis added). No other provision of the Act creates these sorts of rights. Without § 7,

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[10] Contrary to the suggestions of the dissent, the Supreme Court has repeatedly endorsed the distinctive roles of substantive and procedural rights in its recent arbitration case law. As recently as *Italian Colors*, the Supreme Court has held that the key question for courts assessing a statutory rights claim arising from an arbitration agreement is whether the agreement "constitute[s] the elimination of the *right to pursue* that remedy." 133 S. Ct. at 2311 (emphasis in original). Similarly, in *CompuCredit*, the Court distinguished the core, substantive "guarantee" of the Credit Repair Organizations Act ("CROA") from a provision that contemplated the possibility of a judicial forum for vindicating the core right. 132 S. Ct. at 671 (holding that contract "parties remain free to specify" their choice of judicial forum "so long as the *guarantee*" of the Act "is preserved." (emphasis in original)). Contract parties can agree on the procedural terms they like (such as resolving disputes in arbitration), but they may not agree to leave the substantive protections of federal law at the door.

the Act's entire structure and policy flounder. For example, § 8 specifically refers to the "exercise of the rights guaranteed in section 157." 28 U.S.C. § 158; *Bighorn Beverage*, 614 F.2d at 1241 ("Section 8(a)(1) of the Act implements [§ 7's] guarantee").

The Act's other enforcement sections are similarly confused without the rights established in § 7. *See, e.g.*, 29 U.S.C. § 160 (providing powers of the Board to prevent interference with rights in § 7). There is no doubt that Congress intended for § 7 and its right to "concerted activities" to be the "primary substantive provision" of the NLRA. *See Gilmer*, 500 U.S. at 24. For this reason, the right to concerted employee activity cannot be waived in an arbitration agreement.[11]

The dissent ignores this fundamental component of the Supreme Court's arbitration jurisprudence and argues that we must first locate a "contrary congressional command" before preventing the enforcement of an invalid contract term. But as the Seventh Circuit put it, "this argument puts the cart before the horse." *Epic Sys.*, 823 F.3d at 1156. Rather, "[b]efore we rush to decide whether one statute eclipses another, we must stop to see if the two statutes conflict at all." *Id.* The saving clause in the FAA prevents the need for such a conflict.

The dissent and Ernst & Young insist that we must effectively ignore the saving clause and first search to

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[11] An individual can opt-out of a class action, or opt-in to a collective action, in federal court (both procedural mechanisms). This does not enable an employer to require the same individual to waive the substantive labor right to initiate concerted activities set forth in the NLRA.

see which of two statutes will "trump" the other. But this is not the way the Supreme Court has instructed us to approach statutory construction. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995) ("[W]hen two statutes are capable of co-existence . . . it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." (citation omitted)). Nor is a hunt for statutory conflict the "single question" the Supreme Court has told us to ask when examining the FAA's interaction with other federal statutes. Dissent at 35-36. Indeed, if we first had to locate a conflict between the FAA and other statutes, the FAA's saving clause would serve no purpose, which cannot be the case. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant" (citation omitted)); *see Epic Sys.*, 823 F.3d at 1157 (holding that there is no inherent conflict between the FAA and the NLRA).[12] Instead, we join the Seventh Circuit in treating the interaction between the NLRA and the FAA in a very ordinary way: when an arbitration contract professes to waive a substantive federal right, the saving clause of the FAA prevents the enforcement of that waiver.[13]

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[12] Neither the text of the FAA nor the Supreme Court's arbitration cases support the dissent's theory that the FAA's saving clause functions differently when a federal, as opposed to state, statute renders a contract term susceptible to an illegality defense.

[13] Because we see no inherent conflict between the FAA and the NLRA, we make no holding on which statute would win in a fight, nor do we opine on the meaning of their respective dates of passage, re-passage, and amendment.

Thus, the dissent's citations to cases involving the waiver of *procedural* rights are misplaced. *CompuCredit*, for example, was a choice-of-judicial-forum case that addressed the waiver of procedural rights. In the Supreme Court's words, the case concerned "whether claims under the [CROA] can proceed in an arbitrable forum." 132 S. Ct. at 673. In today's case, the issue is not whether any particular forum, including arbitration, is available but rather which substantive rights must be available within the chosen forum. And the Supreme Court has repeatedly held that the core, substantive "rights" created by federal law survive contract terms that purport their waiver. Such was the case in *CompuCredit*, where the Court concluded that the use of a judicial forum contemplated by the CROA could be waived so long as "*the guarantee of the legal power to impose liability*—is preserved." 132 S. Ct. at 671 (emphasis in original). In other words, parties can choose their forums but they cannot contract away the basic guarantees of a federal statute.

Gilmer was also a judicial-choice-of-forum case that addressed the waiver of procedural rights. There the Supreme Court again distinguished between a waivable procedural right (to use a court for class claims rather than arbitration) and a nonwaivable substantive right (to be free from age discrimination). 500 U.S. at 27-29. Not surprisingly, the Court held that the procedural right to use class proceedings in federal court could be waived. *Id.* at 32.[14]

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[14] In fact, the arbitration procedures in *Gilmer* allowed for collective proceedings. *Id.* The plaintiff simply preferred court adjudication.

Italian Colors, as well, was a judicial forum case that endorsed the distinction between a statute's basic guarantee and the various ways litigants may go about vindicating it. The Court was careful to distinguish between the matters "involved in *proving* a statutory remedy" and whether an agreement "constitute[s] the elimination of the *right to pursue* that remedy." *Italian Colors*, 133 S. Ct. at 2311. The plaintiffs objected that it would be infeasible to pursue their antitrust claims against the defendant without the ability to form a class. The Court rejected this argument, noting that so long as the substantive federal right remains—there, the right to pursue antitrust claims in some forum—then the arbitration agreements would be enforced according to their terms. *Id.* at 2310-12.

The dissent misreads these cases to require a conflict between the FAA and the substantive provisions of other federal statutes. But as the Supreme Court has repeatedly made clear, there is a limiting principle built into the FAA on what may be waived in arbitration: where substantive rights are at issue, the FAA's saving clause works in conjunction with the other statute to prevent conflict.

The interaction between the NLRA and the FAA makes this case distinct from other FAA enforcement challenges in at least three additional and important ways.

First, because a substantive federal right is waived by the contract here, it is accurate to characterize its terms as "illegal." The dissent objects that a term in an arbitration contract can only be "illegal" if Congress issues a contrary command specifically referencing arbitration. But then it proceeds to cite cases where no sub-

stantive federal rights were waived. In those cases, the conflict between contract terms and federal law was less direct. In *Italian Colors*, for example, the Court concluded that the antitrust laws establish no statutory right to pursue concerted claims: the acts "make no mention of class actions." *Id.* at 2309. In contrast, the federal statutory regime in this case does exactly the opposite. Where the antitrust laws are silent on the issue of concerted legal redress, the NLRA is unambiguous: concerted activity is the touchstone, and a ban on the pursuit of concerted work-related legal claims interferes with a core, substantive right.

Second, the enforcement defense in this case has nothing to do with the adequacy of arbitration proceedings. In *Concepcion* and *Italian Colors*, the Court held that arguments about the adequacy of arbitration necessarily yield to the policy of the FAA. *Concepcion*, 563 U.S. at 351; *Italian Colors*, 133 S. Ct. at 2312. The Court "specifically rejected the argument that class arbitration [is] necessary to prosecute claims 'that might otherwise slip through the legal system.'" *Italian Colors*, 133 S. Ct. at 2312 (quoting *Concepcion*, 563 U.S. at 351). Here, the NLRA's prohibition on enforcing the "separate proceedings" clause has nothing to do with the adequacy of arbitration. The dissent and Ernst & Young attempt to read *Concepcion* for the proposition that concerted claims and arbitration are fundamentally inconsistent. But *Concepcion* makes no such holding. *Concepcion* involved a consumer arbitration contract, not a labor contract, and there was no federal statutory scheme that declared the contract terms illegal. 563 U.S. at 338. The defense in that case was based on a judge-made state law rule. In contrast, the illegality of the contract term here follows directly from the NLRA. Arbitration between groups of

employees and their employers is commonplace in the labor context. It would no doubt surprise many employers to learn that individual proceedings are a "fundamental" attribute of workplace arbitration. *See also Gilmer*, 500 U.S. at 32, (noting that employer's arbitration "rules also provide for collective proceedings").[15]

Third, the enforcement defense in this case does not specially "disfavor" arbitration. The dissent makes dire predictions about the future of workplace arbitration if the "separate proceedings" clause is invalidated. However, our holding is not that arbitration may not be used in workplace disputes. Quite the contrary. Rather, our holding is simply that when arbitration or any other mechanism is used exclusively, substantive federal rights continue to apply in those proceedings. The only role arbitration plays in today's case is that it happens to be the forum the Ernst & Young contract specifies as exclusive. The contract here would face the same NLRA troubles if Ernst & Young required its employees to use *only* courts, or *only* rolls of the dice or tarot cards, to resolve workplace disputes—so long as the exclusive forum provision is coupled with a restriction on concerted activity in that forum. At its heart, this is a labor law case, not an arbitration case.

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[15] The dissent suggests that employee-claimants could act in "concert" by simply hiring the same lawyers. This is not what the NLRA contemplates by the term "concert." An employer could not, for example, require its employees to sign a pledge not to join a union but remain in conformity with the NLRA by suggesting that employees hire similar attorneys to represent them in wage negotiations. *See also City Disposal Sys.*, 465 U.S. at 834-35 (discussing the term "concert" in federal labor law at the time of the NLRA's passage).

Further, nothing in the Supreme Court's recent arbitration case law suggests that a party may simply incant the acronym "FAA" and receive protection for illegal contract terms anytime the party suggests it will enjoy arbitration less without those illegal terms. We have already held that *Concepcion* supports no such argument:

> The Supreme Court's holding that the FAA preempts state laws having a "disproportionate impact" on arbitration cannot be read to immunize all arbitration agreements from invalidation no matter how unconscionable they may be, so long as they invoke the shield of arbitration. Our court has recently explained the nuance: "*Concepcion* outlaws discrimination in state policy that is *unfavorable* to arbitration."

Chavarria v. Ralphs Grocery Co., 733 F.3d 916, 927 (9th Cir. 2013) (quoting *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1160 (9th Cir. 2013)). Do not be misled. Arbitration is consistent with, and encouraged by, the NLRA following today's opinion.

At bottom, the distinguishing features of today's case are simple. The NLRA establishes a core right to concerted activity. Irrespective of the forum in which disputes are resolved, employees must be able to act in the forum *together*. The structure of the Ernst & Young contract prevents that. Arbitration, like any other forum for resolving disputes, cannot be structured so as to exclude all concerted employee legal claims. As the Supreme Court has instructed, when "private contracts conflict with" the NLRA, "they obviously must yield or the Act

would be reduced to a futility." *J.I. Case*, 321 U.S. at 337.[16]

III

In sum, the "separate proceedings" provision of the Ernst & Young contract interferes with a substantive federal right protected by the NLRA's § 7. The NLRA precludes contracts that foreclose the possibility of concerted work-related legal claims. An employer may not condition employment on the requirement that an employee sign such a contract.

It is "well established . . . that a federal court has a duty to determine whether a contract violates the law before enforcing it." *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83 (1982). Because the district court's order compelling arbitration was based, at least in part, on the separate proceedings provision, we must vacate the order and remand to the district court to determine whether the "separate proceedings" clause is severable from the contract. We take no position on whether arbitration may ultimately be required in this case.

In addition, because the contract's conflict with the NLRA is determinative, we need not—and do not—reach plaintiff's alternative arguments regarding the

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[16] We recognize that our sister Circuits are divided on this question. We agree with the Seventh Circuit, the only one that "has engaged substantively with the relevant arguments." *Epic Sys.*, 823 F.3d at 1159; *but see Murphy Oil II*, 808 F.3d at 1018 (enforcing employer's concerted action waiver under the FAA); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053-54 (8th Cir. 2013).

Norris LaGuardia Act, the FLSA, or whether Ernst & Young waived its right to arbitration.[17]

REVERSED AND REMANDED.

IKUTA, Circuit Judge, dissenting.

Today the majority holds that § 7 of the National Labor Relations Act (NLRA) precludes employees from waiving the right to arbitrate their disputes collectively, thus striking at the heart of the Federal Arbitration Act's (FAA) command to enforce arbitration agreements according to their terms. This decision is breathtaking in its scope and in its error; it is directly contrary to Supreme Court precedent and joins the wrong side of a circuit split. I dissent.

I

The plaintiffs in this case, Stephen Morris and Kelly McDaniel, entered into an agreement with Ernst & Young that included a program for resolving covered disputes. The parties agreed that the program was "the sole method for resolving disputes within its coverage." Under the program, the parties agreed they would first try to resolve a covered dispute by mediation. If that failed, either party could choose to proceed to binding arbitration. The agreement set forth the applicable procedures. Subparagraph K provided:

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[17] Putative-amici labor scholars' motion for leave to file an *amicus* brief is denied. *See* Fed. R. App. P. 29(e). The motion for judicial notice of additional authorities is also denied. *See Louis Vuitton Malletier, S.A. v. Akanoc Sols., Inc.*, 658 F.3d 936, 940 n.2 (9th Cir. 2011).

> Separate Proceedings. If there is more than one Covered Dispute between the Firm and an Employee, all such Covered Disputes may be heard in a single proceeding. Covered Disputes pertaining to different Employees will be heard in separate proceedings.

As the Supreme Court has explained, such a waiver of class actions is typical in the arbitration context because the class procedural mechanism "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). Among other problems, "there is little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process." *Id.* at 347. Class mechanisms also eviscerate the principal benefits of arbitration—speed and informality, "mak[ing] the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 348.

Notwithstanding the agreement to arbitrate, Morris brought a complaint in federal district court alleging that Ernst & Young had violated the Fair Labor Standards Act (FLSA) and analogous state law by improperly classifying him and other employees as exempt employees who were not entitled to overtime wages. (McDaniel was later added as a plaintiff.) Morris purported to bring the action as a class action under Rule 23 of the Federal Rules of Civil Procedure and as a collective action under

29 U.S.C. § 216(b) of the FLSA.[1] After some procedural complications not relevant here, Ernst & Young moved to compel arbitration under its agreement. Morris argued that the "Separate Proceedings" clause of his agreement violated § 7 of the NLRA. The district court rejected this argument. In reversing, the majority holds that employees may not be required to waive the use of a class action mechanism in arbitrating or litigating their claims. To the extent the Supreme Court has held that class actions are inconsistent with arbitration, *see Concepcion*, 563 U.S. at 344, the majority effectively cripples the ability of employers and employees to enter into binding agreements to arbitrate.

II

Under the FAA, agreements to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *Concepcion*, 563 U.S. at 339. As the Supreme Court has repeatedly explained, the FAA was

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[1] Section 216(b) provides a class action mechanism similar to that contemplated by Rule 23, although it requires voluntary opt in by the members of the class. It states, in pertinent part:

> An action to recover the liability prescribed in [§ 216(b)] may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. § 216(b).

enacted to overcome "widespread judicial hostility to arbitration agreements." *Concepcion*, 563 U.S. at 339. The Supreme Court's cases have "repeatedly described the Act as embod[ying] [a] national policy favoring arbitration and a liberal federal policy favoring arbitration agreements." *Id.* at 346 (internal quotation marks and citations omitted). The FAA's national policy applies to the states, *see, e.g.*, *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984), and forecloses any state statute or common law rule that attempts "to undercut the enforceability of arbitration agreements," *id.* at 16, unless the savings clause in § 2 is applicable, *see Concepcion*, 563 U.S. at 344; *Perry v. Thomas*, 482 U.S. 483, 492 n.9, (1987). Therefore, when a party claims that a state law prevents the enforcement of an arbitration agreement, the court must determine whether that law is preempted by the FAA or is rescued from preemption by the FAA's savings clause. *See Concepcion*, 563 U.S. at 339-42.

But when a party claims that a federal statute makes an arbitration agreement unenforceable, the Supreme Court takes a different approach. In determining whether the FAA's mandate requiring "courts to enforce agreements to arbitrate according to their terms" has been overridden by a different federal statute, the Supreme Court requires a showing that such a federal statute includes an express "contrary congressional command." *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (internal quotation marks omitted). The burden is on the party challenging the arbitration agreement to show that Congress expressly intended to preclude a waiver of the judicial forum. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). "If such an intention exists, it will be discoverable in the text of the [federal act], its legislative history, or an 'inherent

conflict' between arbitration and the [federal act's] underlying purposes." *Id.* "Throughout such an inquiry, it should be kept in mind that 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.' " *Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

Contrary to the majority's focus on whether the NLRA confers "substantive rights," in every case considering a party's claim that a federal statute precludes enforcement of an arbitration agreement, the Supreme Court begins by considering whether the statute contains an express "contrary congressional command" that overrides the FAA. *See, e.g., Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013); *CompuCredit*, 132 S. Ct. at 669, *Gilmer*, 500 U.S. at 29.[2] To date, in every case in which the Supreme Court has conducted this analysis of federal statutes, it has harmonized the allegedly contrary statutory language with the FAA and allowed the arbitration agreement at issue to be enforced according to its terms.[3] Thus in *CompuCredit*, the Court

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[2] The Supreme Court has applied the same approach, and reached the same conclusion, in upholding a collective bargaining agreement with a mandatory arbitration clause governed by the NLRA. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265-74 (2009).

[3] Only *Wilko v. Swan* held that the Securities Act of 1933 contained an unwaivable right to a judicial forum for claims under the Act, thereby precluding the enforcement of an arbitration agreement between parties to a sale of securities. 346 U.S. 427, 432-37 (1953). But the Court expressly overruled *Wilko* in *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, rejecting its reasoning as "pervaded . . . by the old judicial hostility to arbitration." 490 U.S. 477, 480, 109 (1989) (internal quotation marks omitted); *see also Pyett*, 556 U.S. at 266-67.

considered a purported "contrary congressional command" in the Credit Repair Organization Act (CROA), 15 U.S.C. § 1679 et seq., which the plaintiffs claimed precluded consumers from entering an arbitration agreement that waived their right to litigate an action in a judicial forum. 132 S. Ct. at 669. The plaintiffs pointed to the language in CROA that required a business to tell a consumer that "[y]ou have a right to sue," 15 U.S.C. § 1679c(a), that provided for actual and punitive damages in both individual legal actions and class actions, *id.* § 1679g, and that provided that "[a]ny waiver by any consumer of any protection provided by or any right of the consumer" was void and could "not be enforced by any Federal or State court," *id.* § 1679f(a).

The Supreme Court rejected this claim. Overruling the Ninth Circuit, the Court held that had Congress meant to prohibit arbitration clauses, "it would have done so in a manner less obtuse than what respondents suggest." *CompuCredit*, 132 S. Ct. at 672. According to the Court, when Congress wants to restrict the use of arbitration "it has done so with a clarity that far exceeds the claimed indications in the CROA." *Id.* The Supreme Court gave two examples of what would constitute a sufficiently clear "contrary congressional command":

"No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section." *Id.* (quoting 7 U.S.C. § 26(n)(2) (2006 ed., Supp. IV)).

"Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to

settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy." *Id.* (quoting 15 U.S.C. § 1226(a)(2) (2006 ed.)).

Because the language in the two CROA provisions cited by plaintiffs did not expressly state that a predispute arbitration agreement was unenforceable, the Court determined that they were consistent with enforcement of an arbitration agreement. The "right to sue" language, for instance, merely allowed parties to enter into an agreement requiring initial arbitral adjudication, which then could be reviewed in a court of law. *Id.* at 670-71. Because the CROA was "silent on whether claims under the Act can proceed in an arbitrable forum," the Court held that "the FAA requires the arbitration agreement to be enforced according to its terms." *Id.* at 673.

In *Gilmer*, plaintiffs claimed the Age Discrimination in Employment Act of 1967 (ADEA) contained a contrary congressional command to the FAA's mandate. 500 U.S. at 27-30. Specifically, the plaintiffs pointed to language allowing employees to litigate in court as providing an unwaivable right to access a judicial forum: "[a]ny person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purpose of this chapter," 29 U.S.C. § 626(c)(1); *Gilmer*, 500 U.S. at 27. They also pointed to language they claimed precluded employees from waiving the right to bring a class action: "The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in section . . . 216," 29 U.S.C. § 626(b), where § 216(b) (also at issue here) states that an action under the FLSA may be

brought in court "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated," although the represented employees must consent. In other words, the plaintiffs argued that because the ADEA explicitly provided for a class mechanism, the statute precluded the enforcement of an arbitration agreement that included a class action waiver.

The Supreme Court rejected this argument. Once again, the statutory language was not sufficiently clear to prevent the enforcement of arbitration agreements that included a class action waiver. Looking closely at the text of the statute, the Court noted that while Congress allowed for judicial resolution of claims, it "did not explicitly preclude arbitration or other nonjudicial resolution of claims." *Gilmer*, 500 U.S. at 27-29. Moreover, "the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." *Id.* at 32. Thus, the language on which the plaintiffs relied was entirely consistent with enforcing an arbitration agreement that precluded a class mechanism. *See also Italian Colors*, 133 S. Ct. at 2311 ("In *Gilmer* . . . we had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue . . . expressly permitted collective actions."). Turning to the ADEA's legislative history, the Supreme Court found nothing showing a congressional intention to preclude waiver of a judicial forum. *Gilmer*, 500 U.S. at 29. Indeed, the Court found in the ADEA a "flexible approach to resolution of claims" and other indicia that Congress did not intend to preclude individual arbitration of disputes. *Id.* at 29-31.

Finally, in *Italian Colors*, there was a purported "inherent conflict," *Gilmer*, 500 U.S. at 26, between arbitration and the policies underlying the Sherman and Clayton Acts, 133 S. Ct. at 2310-12. According to plaintiffs, the cost of individually arbitrating their antitrust claims would so far exceed the potential recovery that requiring them to litigate their claims individually would render the plaintiffs unable to vindicate their federal statutory rights. *Id.* The Supreme Court rejected this argument. Examining the text of the acts, the Court noted that the federal acts "make no mention of class actions," and were "enacted decades before the advent of Federal Rule of Civil Procedure 23." *Id.* at 2309. The Court gave even less weight to the plaintiffs' policy arguments. With respect to the argument that "federal law secures a nonwaivable *opportunity* to vindicate federal policies by satisfying the procedural strictures of Rule 23 or invoking some other informal class mechanism in arbitration," the Court simply stated that "we have already rejected that proposition" in *Concepcion*. *Id.* at 2310. In *Concepcion*, the Court made clear that the FAA allows parties to waive the use of a class mechanism because such a mechanism "interferes with fundamental attributes of arbitration." 563 U.S. at 344.

In sum, the Supreme Court consistently rejects claims that a "contrary congressional command" precludes courts from enforcing arbitration agreements according to their terms, including when such agreements waive the use of class mechanisms. In analyzing such arguments, the Court has focused primarily on a single question: whether the text of the federal statute at issue expressly precludes the use of a predispute arbitration agreement for the underlying claims at issue. If the statute does not, the Court's "healthy regard for the federal

policy favoring arbitration," *Moses H. Cone*, 460 U.S. at 24, leads it to conclude that there is no such contrary command, and the Court reads the purportedly contrary federal statute to allow the enforcement of the agreement to arbitrate. The Court has likewise rejected claims that the legislative history or policy of the federal statute requires a different result. *See Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89-90 (2000) (noting that the Court has "rejected generalized attacks on arbitration that rest on 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.'" (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481, (1989))).

III

Here, the majority ignores the thrust of Supreme Court precedent and declares that arbitration is precluded because it interferes with a substantive right protected by § 7 and § 8 of the NLRA.[4] Section 7 states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own

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[4] Although the majority cites *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), it does not defer to the NLRB's interpretation of § 7 as overriding the command of the FAA in *In re D.R. Horton v. NLRB*, 357 NLRB No. 184 (2012), which was subsequently overruled by the Fifth Circuit. *See D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013). Rather, the majority states that "the NLRA is unambiguous, and there is no need to proceed to the second step of *Chevron*." Maj. Op. at 13.

> choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

29 U.S.C. § 157. Section 8 merely makes it "an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7]." 29 U.S.C. § 158(a).

A

Nothing in this language comes remotely close to the examples of contrary congressional commands the Supreme Court identified in *CompuCredit*, where Congress expressly stated that "[n]o predispute arbitration agreement shall be valid or enforceable." 132 S. Ct. at 672. The language of § 7 and § 8 of the NLRA neither mention arbitration nor specify the right to take legal action at all, whether individually or collectively. *See Italian Colors*, 133 S. Ct. at 2309 ("The Sherman and Clayton Acts make no mention of class actions."). Applying Supreme Court precedent, we must conclude there is no "contrary congressional command" in the text of the NLRA.

Moreover, contrary to the majority, Maj. Op. at 6, nothing in either § 7 or § 8 creates a substantive right to the availability of class-wide claims that might be contrary to the FAA's mandate. While the NLRA protects concerted activity, it does not give employees an unwaivable right to proceed as a group to arbitrate or litigate disputes. Rather, as in *CompuCredit* and *Gilmer*, the language can be harmonized with enforcement of an arbitration agreement that waives class action mechanisms. According to a dictionary roughly contemporaneous with the passage of the NLRA, "concerted" action is action

that is "mutually contrived or planned: agreed on." Webster's International Dictionary of the English Language 295 (1903 ed.). A natural reading of § 7's right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" enables employees to jointly arrange, plan, and carry out group efforts to dispute employer positions. In a legal context, this could include joint legal strategies, shared arguments and resources, hiring the same attorneys, or even requesting the Department of Labor to bring an independent action against the employer. But the language does not expressly preserve any right for employees to use a specific *procedural* mechanism to litigate or arbitrate disputes collectively; even less does it create an unwaivable right to such mechanism. Indeed, the text provides no basis for the majority's conclusion that § 7 gives employees a substantive, unwaivable right to use Rule 23, § 216(b) of the FLSA, or any other procedural mechanism that might be available for bringing class-wide actions.[5] Accordingly, the Supreme Court's precedent compels the conclusion that neither § 7 nor § 8 contains a "contrary congressional command" that precludes enforcing Morris's arbitration agreement according to its terms. If this were not the case, the Court's statement that *Gilmer* "had no qualms in enforcing a class waiver in an arbitration agreement even though the

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[5] The majority claims that *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978), conclusively supports its view that § 7 of the NLRA includes a substantive right to class action procedures. Maj. Op. at 11-12 n.3. This is incorrect. The Court declined to delineate the rights that are provided by § 7 in an administrative or judicial forum, stating: "We do not address here the question of what may constitute 'concerted' activities in this context." *Eastex, Inc.*, 437 U.S. at 566 n.15.

federal statute at issue, the Age Discrimination in Employment Act, expressly permitted collective actions," *Italian Colors*, 133 S. Ct. at 2311, would be meaningless. Under the majority's reasoning, regardless whether a class action waiver survives express language in the ADEA, as *Gilmer* held, the waiver nevertheless is unenforceable in every action by an employee against an employer due to the unwaivable right to class procedures in the NLRA.

Nor does the legislative history of the NLRA demonstrate an intent to preclude individual resolution of disputes. The NLRA was enacted decades before Rule 23 created the modern class action in 1966. As the Fifth Circuit observed, in enacting the NLRA "Congress did not discuss the right to file class or consolidated claims against employers," and therefore "the legislative history also does not provide a basis for a congressional command to override the FAA." *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 361 (5th Cir. 2013). The majority does not cite any legislative history to the contrary.

Finally, there is no "inherent conflict between arbitration" and the "underlying purposes" of the NLRA. *Gilmer*, 500 U.S. at 26. The majority argues that the very purpose of the NLRA is to enable employees to engage in concerted activity, and therefore, it necessarily also has the purpose of enabling employees to engage in collective legal activity, including class actions. Maj. Op. at 9-10. Even assuming that concerted action is "the basic tenet of federal labor policy," *id.* at 10, nothing in the NLRA suggests that this protection includes the right to resolve disputes using a particular legal procedure. The majority's attempt to equate a substantive right to concerted action with a legal procedural mecha-

nism for resolving disputes has no basis in history or Supreme Court precedent. To the contrary, the Court has held that "the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980). Moreover, as the Fifth Circuit pointed out, there is "limited force to the argument that there is an inherent conflict between the FAA and NLRA when the NLRA would have to be protecting a right of access to a procedure that did not exist when the NLRA was (re)enacted." *D.R. Horton*, 737 F.3d at 362. Indeed, as the majority acknowledges, "federal labor policy *favors* and promotes arbitration." Maj. Op. at 16 (emphasis added). *See United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) ("[A]rbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself."); *Pyett*, 556 U.S. at 257 ("Parties generally favor arbitration precisely because of the economics of dispute resolution.").

In sum, nothing in the text, legislative history, or purposes of § 7 precludes enforcement of an arbitration agreement containing a class action waiver.

B

In order to avoid this conclusion, the majority disregards the Supreme Court's guidance, and instead conflates the question whether "the FAA's mandate has been overridden by a contrary congressional command," *CompuCredit*, 132 S. Ct. at 669 (internal quotation marks omitted), with the question whether an employee's agreement to arbitrate individually is invalid under the FAA's savings clause, 9 U.S.C. § 2 (providing that an

agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"). The majority reasons that: (1) the "Separate Proceedings" requirement in Morris's contract that all disputes must be resolved individually is illegal because it violates the NLRA; (2) a party may raise a defense that a contract provision is illegal, and such a defense is generally applicable and not related specifically to arbitration agreements; and therefore (3) in response to Ernst & Young's motion to compel arbitration, Morris's defense that the "Separate Proceedings" requirement is illegal is preserved by the FAA's savings clause. In adopting this line of reasoning, the majority joins the Seventh Circuit (the only circuit with which the majority agrees). *See Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016) (holding that § 7 of the NLRA mandates collective legal action for employees, and therefore an arbitration agreement waiving such collective legal action is "illegal" and thus unenforceable under the FAA's savings clause.)

This reasoning is contrary to the Supreme Court's FAA jurisprudence. Maj. Op. at 14-17. First, the Supreme Court does not apply the savings clause to federal statutes; rather, it considers whether Congress has exercised its authority to override the FAA's mandate to enforce arbitration agreements according to their terms. *See CompuCredit*, 132 S. Ct. at 669. If there is no "contrary congressional command," i.e., an express statement such as "[n]o predispute arbitration agreement shall be valid or enforceable," *id.*, then the Supreme Court will conclude that the federal statute at issue can be harmonized with the FAA. Second, the majority's reasoning is specious because it is based on the erroneous assumption that the waiver of the right to use a col-

lective mechanism in arbitration or litigation is "illegal." But such a waiver would be illegal only if it were precluded by a "contrary congressional command" in the NLRA, and here there is no such command.

Moreover, even if the FAA's savings clause were applicable to a federal statute, the majority's construction of § 7 and § 8 of the NLRA as giving employees a substantive, nonwaivable right to classwide actions would not be saved under that clause. As *Concepcion* explained, such a purported right would disproportionately and negatively impact arbitration agreements by requiring procedures that "interfere[] with fundamental attributes of arbitration." *Concepcion*, 563 U.S. at 344. Because class procedures are generally "incompatible with arbitration," *id.* at 351, and "nothing in [the FAA's savings clause] suggests an intent to preserve [defenses] that stand as an obstacle to the accomplishment of the FAA's objectives," such rules do not fall within the confines of the savings clause, *id.* at 343. The majority's argument that the nonwaivable right to class-wide procedures it has discerned in § 7 applies equally to arbitration and litigation and so is saved by the § 2 savings clause, Maj. Op. at 16-17, was expressly rejected in *Concepcion*, *see* 563 U.S. at 338 (rejecting plaintiffs' argument that a state rule prohibiting class action waivers in adhesion contracts applied equally to judicial and arbitral proceedings and thus fit the § 2 savings clause).

The majority's erroneous reasoning leads to a result that is directly contrary to Congress's goals in enacting the FAA. Given that lawyers are unlikely to arbitrate on behalf of individuals when they can represent a class, *see id.*, 563 U.S. at 347, and an arbitrator cannot hear a class arbitration unless such a proceeding is explicitly provid-

ed for by agreement, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010), the employee's purported nonwaivable right to class-wide procedures virtually guarantees that a broad swath of workplace claims will be litigated, *Concepcion*, 563 U.S. at 347. The majority's reasoning is likewise contrary to the Supreme Court's ruling that collective actions are not necessary to protect employees' federal statutory rights. *See Gilmer*, 500 U.S. at 32; *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) ("We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context.").

IV

The Second, Fifth, and Eighth Circuits have concluded that the NLRA does not invalidate collective action waivers in arbitration agreements. *See Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772, 775 (8th Cir. 2016); *D.R. Horton*, 737 F.3d at 362; *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013). These decisions are consistent with Supreme Court precedent, which has made it abundantly clear that arbitration agreements must be enforced according to their terms unless Congress has given an express contrary command.

In teasing out of the NLRA a "mandate" that prevents the enforcement of Morris's arbitration agreement, the majority exhibits the very hostility to arbitration that the FAA was passed to counteract. The Court recognized in *Concepcion* that the pre-FAA judicial antagonism to arbitration agreements "manifested itself in 'a great variety' of 'devices and formulas' declaring arbi-

tration against public policy." 563 U.S. at 342 (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959)). Today the majority invents a new such formula. Because I would follow the Supreme Court precedent and join the majority of the circuits concluding that § 7 of the NLRA does not prevent the collective action waiver at issue here, I would hold that Morris's contract must be enforced according to its terms. I therefore dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA
SAN JOSE DIVISION

No. 12-04964-RMW

STEPHEN MORRIS and KELLY MCDANIEL, on behalf of themselves and all others similarly situated,
Plaintiffs,

v.

ERNST & YOUNG LLP, and
ERNST & YOUNG U.S., LLP, Defendants.

Filed: July 9, 2013

ORDER GRANTING ERNST & YOUNG LLP'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, STAY PROCEEDINGS AND COMPEL ARBITRATION

WHYTE, United States District Judge.

Plaintiffs Stephen Morris ("Morris") and Kelly McDaniel ("McDaniel"), former EY employees, claim that EY unlawfully classified them and other individuals as exempt from federal and California overtime laws. On January 11, 2013, defendants Ernst & Young LLP and

Ernst & Young U.S., LLP, (collectively "EY" or "defendants") moved to dismiss the present action, or in the alternative to stay proceedings and compel arbitration. Having considered the arguments of the parties, and for the reasons set forth below, the court **GRANTS** EY's motion to compel arbitration and dismisses the action accordingly.

I. BACKGROUND

A. The EY Arbitration Agreement

EY maintains a "Common Ground Dispute Resolution Program" ("Dispute Resolution Program" or "Arbitration Agreement") for resolving disputes between EY and employees. Dkt. No. 42-4 (Hoddap Decl., Ex. C). The Arbitration Agreement provides that it "is the sole method for resolving disputes within its coverage." *Id.* ¶ I. Under its terms, the Arbitration Agreement covers "[a]ll claims, controversies or other disputes between [EY] and an Employee that could otherwise be resolved by a court," and provides that "[n]either [EY] nor an Employee will be able to sue in court in connection with a Covered Dispute." *Id.* ¶ II.B.1. Covered disputes include "[c]laims based on federal statutes such as . . . the Fair Labor Standards Act," "based on state statutes," and "concerning wages, salary, and incentive compensation programs." *Id.* ¶ II.C. The Arbitration Agreement is expressly governed by the Federal Arbitration Act ("FAA") or, if the FAA is held not to apply, by New York State law." *Id.* ¶ V.G.

Relevant here, the Arbitration Agreement provides: (1) that "Covered Disputes pertaining to different Employees will be heard in separate proceedings," *id.* ¶ IV.K; (2) that "Arbitrator fees and other costs of the

arbitration . . . [shall] be shared equally to the extent permitted by law and the Arbitration Rules," *id.* ¶ IV.P; and (3) that "[e]ach party will be responsible for the party's own attorney's fees and related expenses, but the Arbitrator will have authority to provide for reimbursement of the Employee's attorney's fees, in whole or part, in accordance with applicable law or in the interest of justice," *id.*

B. The Plaintiffs

McDaniel began her employment at EY on October 1, 2008. McDaniel's signed offer letter included a copy of EY's Arbitration Agreement, and provided therein that that all employment-related disputes would be subject to the Agreement's mandatory mediation or arbitration provisions. In addition, McDaniel signed a confidentiality agreement that incorporated by reference the terms of the Arbitration Agreement. Morris began his employment at EY in January 2005. In March and April of 2006, EY sent an email to all employees attaching a copy of its "revised" Arbitration Agreement, and stating therein that "An Employee indicates his or her agreement to the [Dispute Resolution] Program and is bound by its terms and conditions by beginning or continuing employment with the firm after May [25], 2006." Dkt. Nos. 42-6, 42-7 (McGuire Decl., Exs. A & B). EY asserts that the plaintiffs are bound by the Arbitration Agreement based on their express (McDaniel) or implied (Morris) acceptance of its terms. Defs.' Br. 7. The plaintiffs do not dispute this argument in their opposition brief, *see* Opp'n 4-5, but rather argue that the Arbitration Agreement is unenforceable for five reasons discussed in Part II.B *infra*.

Morris and McDaniel seek approximately $17,642.97 and $28,805.19 in overtime payments respectively, and each claim additional potential damages under California law. Plaintiffs allege that the costs of complying with the Arbitration Agreement and settling each employee's dispute separately "would be in excess of $160,000 in attorney's fees, and $33,500 in expert witness fess, and well over $6,000 of additional costs and potentially in addition to one-half of the arbitrator's estimated $24,000 fee." Opp'n 6.

C. Procedural History

There are three actions related to this case. The first is *Ho v. Ernst & Young LLP*, Case No. 05-04867 ("*Ho*"). In that case, in September 2005, David Ho commenced a class action against EY raising the same claims under the California Labor Code that plaintiffs raise in the present action. *Ho* was then related to *Richards v. Ernst & Young LLP*, Case No. 08-04988 and *Landon v. Ernst & Young LL*, Case No. 08-02853 (collectively "*Ho* related cases"). Morris and McDaniel, the plaintiffs here, were putative class members in the *Ho* related cases. In *Ho*, the court denied EY's motion to compel arbitration on the basis that EY waived its right to enforce the Arbitration Agreement. *Ho*, No. 05-04867, 2011 WL 4403625, at *6 (N.D. Cal. Sept. 20, 2011). The court found waiver based on the significant prejudice to the plaintiffs resulting from nearly six years of litigation before EY moved to compel arbitration. *Id.* The court also denied class certification with respect to plaintiff Fernandez. *Id.* at *3; *Ho*, 2011 WL 4985047 (N.D. Cal. Oct. 19, 2011) (order denying plaintiffs' motion for reconsideration on the class certification issue with respect to Fernandez). After the court's finding that EY waived the right to arbitrate

and denial-in-part of class certification, on December 8, 2011, plaintiffs moved to add Morris as a new representative plaintiff. *Ho*, No. 05-04867, Dkt. No. 311. On January 11, 2012, the court denied the plaintiffs' request to add Morris as a class representative in *Ho* based on undue delay. *Id.*, Dkt. No. 322.

In February 2012, Morris filed the present action in the Southern District of New York, alleging six causes of action related to the alleged misclassification as exempt from federal and California overtime laws under the Fair Labor Standards Act ("FLSA") and the California Labor Code. In April 2012, Morris amended his complaint to add McDaniel, who asserted the same claims as Morris. Neither Morris nor McDaniel attempted to utilize EY's Dispute Resolution Program to resolve their dispute. In May 2012, EY filed motions to transfer this case from the Southern District of New York to the Northern District of California and to relate this action to the *Ho* related cases. Dkt. No. 24. The court granted the motions, and the cases were consolidated and reassigned to the undersigned. Dkt. No. 36. On January 11, 2013, EY filed the present motion to compel arbitration.

II. ANALYSIS

A. Legal Standard

Under the FAA, a contractual agreement "to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "[T]his provision . . . reflect [s] both a 'liberal federal policy favoring arbitration,' and the 'fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC*

v. Concepcion, 131 S. Ct. 1740, 1745 (2011) (internal quotations omitted). Thus, "[t]he court's role under the [FAA] is ... limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000) (citing 9 U.S.C. § 4).

Claims based on statutory rights may be arbitrated pursuant to the FAA "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *see also Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987). The Court has seldom found congressional intent to preclude such a waiver, and has enforced contracts to arbitrate claims under the Sherman Act, the Racketeer Influenced and Corrupt Organizations Act, Age Discrimination in Employment Act, and the Securities Exchange Act of 1934. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 33, 35 (1991) (citing cases).

If a court grants a motion to compel arbitration, pursuant to the FAA the court must stay the proceedings pending arbitration. 9 U.S.C. § 3. "[T]he FAA ... does not 'limit the court's authority to grant a dismissal,' " however, when a court requires arbitration with respect to all claims. *Quevedo v. Macy's Inc.*, 798 F. Supp. 2d 1122, 1143 (C.D. Cal. 2011) (quoting *Sparling v. Hoffman Constr. Co.*, 864 F.2d 634, 638 (9th Cir. 1988). Although this case was transferred from a district court in the Second Circuit, this court applies Ninth Circuit law in reviewing the federal claims. *Newton v. Thomason*, 22 F.3d 1455, 1460 (9th Cir. 1994) ("[W]hen reviewing

federal claims, a transferee court in this circuit is bound only by our circuit's precedent.").

B. Parties' Arguments

EY argues that its Dispute Resolution Program is a valid agreement to arbitrate based on the employees' express acceptance (McDaniel's signed offer letter) or implied acceptance (Morrison's continued employment after the program was instituted) of its terms. *See Shah v. Wilco Sys., Inc.*, 806 N.Y.S. 2d 553, 557 (N.Y. App. Div. 2005) (Under New York law, an "[at will] employee's continued employment is deemed to be a consent" to changes in employment terms.).[1] Further, EY argues that its Dispute Resolution Program encompasses the claims at issue here. According to EY, because the Arbitration Agreement is valid and encompasses the claims at issue, "there is 'no place for exercise of discretion,' and the [c]ourt must 'direct the parties to proceed in arbitration.'" Defs.' Br. 5, Dkt. No. 42 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985)).

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[1] Defendants cite New York law because the Arbitration Agreement provides that New York law governs any dispute arising under the arbitration "Program" where the FAA is "held not to apply." However, to the extent California law applies to the determination of *whether* the employees actually *agreed to be bound* by EY's Arbitration Agreement, California law also deems an at will employee's continued employment after notification of an arbitration program an agreement to be bound by the terms of the arbitration program. *See Craig v. Brown & Root, Inc.*, 84 Cal. App. 4th 416, 419-21 (2000) (holding that, where employee received notification of employer's arbitration program through two mailings and continued working, her continued employment constituted an agreement to be bound by the arbitration program).

Plaintiffs counter that the EY Arbitration Agreement is unenforceable because: (1) it does not provide for mandatory shifting of costs and expenses, as required by the FLSA; (2) even if the Agreement preserves plaintiffs' rights to fee shifting, the cost of proceeding individually is prohibitively expensive such that arbitration would not allow the plaintiffs to "effectively vindicat[e] [their] statutory rights," *Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547, 549-50 (S.D.N.Y. 2011) ("*Sutherland I*") and *Sutherland v. Ernst & Young LLP*, 857 F. Supp. 2d 528, 533, 536-38 (S.D.N.Y. 2012) ("*Sutherland II* "); (3) EY waived its right to compel arbitration based on its litigation conduct in this case and in a related case where Morris was a class member; (4) the class and collective action waiver terms in the Arbitration Agreement conflict with the statutory right to collective action in the FLSA; and (5) those same terms violate Sections 7 and 8 of the National Labor Relations Act ("NLRA"), as decided in *D.R. Horton, Inc. v. N.L.R.B.*, No. 12-ca-25764, 357 NLRB No. 184 (Jan. 3, 2012). The court addresses each of plaintiff's arguments in turn.

C. Mandatory Fee-Shifting Under the FLSA

The FLSA provides that "[t]he court . . . shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 26 U.S.C. § 216(b). Plaintiffs argue that § 216(b) mandates fee shifting for employees who successfully sue for violation of the Act. Because the Arbitration Agreement does not provide for this "mandatory" fee shifting, plaintiffs argue that it violates the FLSA, and is therefore unenforceable.

Section 216(b) does not require an arbitration agreement to affirmatively mandate fee shifting. *See Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 82 (2000) (holding that an arbitration agreement that did not mention arbitration costs and fees was not *per se* unenforceable where plaintiff presented no evidence as to the likelihood that she would incur prohibitive costs in arbitration). Plaintiffs cite *McBurnie v. City of Prescott*, No. 09-8139, 2010 WL 5344927 (D. Ariz. Dec. 22, 2010), to support the proposition that fee-shifting is mandatory under the FLSA. While *McBurnie* does emphasize that shifting attorney's fees for prevailing plaintiffs is mandatory and nonwaivable under the FLSA, the court did not hold that an arbitration agreement must affirmatively require mandatory fee shifting in order to be enforceable. *Id.* at *2-3. For example, where the parties stipulate to fee shifting or where the agreement gives the arbitrator the power to shift fees in accordance with applicable laws, there may be no violation of § 216(b). *See Sutherland II*, 847 F. Supp. 2d at 532 n.1.

In *Sutherland II*, although "the [Arbitration] Agreement appear[ed] to prevent shifting of costs or expenses on behalf of a prevailing plaintiff," EY's stipulations in that case (to shift fees and costs to EY if the employee prevailed) addressed these "most obvious obstacles to Sutherland's vindication of her claims." *Id.* In *Sutherland II*, the court found EY's Arbitration Agreement unenforceable not on the basis of the lack of a fee shifting provision, but rather on the basis that the Arbitration Agreement's waiver of collective action made arbitration prohibitively expensive for the employee in that case to vindicate her statutory rights. *Id.* at 533, 536-38; *see* Part II.D *infra*.

In this case, EY has made the same stipulations as in *Sutherland II*. Defs.' Mot. 2; *Sutherland II*, 847 F. Supp. 2d at 532 n.1. Specifically, EY "stipulates that plaintiffs are entitled to recover in arbitration any fees and costs that they could recover in court if they prevail on their individual claims" and "that [EY] will bear all administrative costs and arbitrator fees." Defs.' Mot. 2. Further, EY's Arbitration Agreement allows fee shifting "in accordance with the law," Arbitration Agreement ¶ IV.P.3, and both the FLSA and California law provide for recovery of attorney's fees as a matter of right for prevailing plaintiffs. In light of EY's express stipulations and the terms of the Arbitration Agreement expressly permitting plaintiffs to recover attorney's fees "in accordance with the law," plaintiffs' fee-shifting rights are adequately protected even if arbitration is compelled.

D. Whether Arbitration is Prohibitively Expensive

Plaintiffs argue that, like in *Sutherland*, even if the costs of arbitration could be shifted, the waiver of the ability to proceed in a collective action set forth in the Arbitration Agreement effectively makes individual arbitration prohibitively expensive for the plaintiffs to enforce their statutory rights. Based on EY's express stipulations, EY counters that "plaintiffs have the potential to be *fully compensated* for the costs of bringing suit." Reply 16 (underline in brief). Thus, EY contends that there are no costs "unique to arbitration whatsoever, let alone costs that could render arbitration prohibitively expensive." Reply 10. EY urges the court not to follow *Sutherland*'s application of the prohibitive costs doctrine because the Ninth Circuit has rejected that court's cost-benefit approach. *Id.* at 14.

"[W]here [a] party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Green Tree*, 531 U.S. at 92.[2] Thus, courts generally hold that a party opposing arbitration "must provide some *individualized evidence* that it likely will face prohibitive costs in the arbitration at issue *and* that it is financially incapable of meeting those costs." *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003) (citing *Bradford v. Rockwell Semiconductors Sys., Inc.*, 238 F.3d 549, 557 (4th Cir. 2001)) (emphases added). While *Green Tree* recognized that "the existence of large arbitration costs may well preclude a litigant . . . from effectively vindicating" her statutory rights, it explicitly did not address "[h]ow detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence." *Green Tree*, 531 U.S. at 91-92 (not reaching this issue because there was no evidence whatsoever of any prohibitive costs, and "[t]he 'risk' that [petitioner] w[ould] be saddled with prohibitive costs [wa]s too speculative to justify the invalidation of an arbitration agreement").

Plaintiffs cite *Sutherland I*, where the court found EY's Arbitration Agreement unenforceable where the cost of prosecuting an individual claim was prohibitive relative to that individual's potential recovery. *See Suth-*

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[2] The "prohibitive costs" doctrine from *Greem Tree* is "limited to federal statutory rights." *Coneff*, 673 F.3d at 1159 n.2 ("*Mitsubishi, Gilmer, Green Tree* and similar decisions are limited to federal statutory rights."). Thus, the court's analysis of the applicability of *Green Tree* to the present case does not apply to plaintiffs' California Labor Code claims.

erland I, 768 F. Supp. 2d at 551. But both *Sutherland I* and *II* relied on the Second Circuit's prohibitive costs doctrine set forth in the *American Express* rulings: *In re American Express Merchants' Litigation*, 554 F.3d 300 (2d Cir. 2009) (*Amex I*); *In re American Express Merchants' Litigation*, 634 F.3d 187, 199 (2d Cir. 2011) (*Amex II*) (reconsideration of *Amex I* on remand from the Supreme Court); and *In re American Express Merchants' Litigation*, 681 F.3d 139 (2d Cir. 2012) (*Amex III*) (sua sponte reconsideration of *Amex II* in view of *AT&T Mobility LLC v. Concepcion*). In these rulings, the Second Circuit held that the class action waiver in plaintiffs' arbitration agreement was unenforceable because individual arbitration proceedings were prohibitively expensive and thus plaintiffs were entitled to class proceedings to effectively vindicate their statutory rights. The Supreme Court granted certiorari and reversed the Second Circuit's holding under the prohibitive costs doctrine *sub nom American Express Co. v. Italian Colors Restaurant*, ___ S. Ct. ___, 2013 WL 3064410, at *7 (June 20, 2013) (*Amex IV*). In *Amex IV*, the Supreme Court held that there is "no entitlement to class proceedings for the vindication of statutory rights." *Id.* at *4.

The Ninth Circuit has also rejected the Second Circuit's approach to the prohibitive costs doctrine. *See Coneff v. AT&T Corp.*, 673 F.3d 1155, 1159 (9th Cir. 2012) ("To the extent that the Second Circuit's opinion is not distinguishable, we disagree with it ...."); *see also Amex III*, 681 F.3d 139, 144 (2d Cir. 2012) (Jacobs, J., dissenting) (observing that the *Amex III* majority diverged from the Ninth Circuit's holding in *Coneff*); *Jasso v. Money Mart Exp., Inc.*, 879 F. Supp. 2d 1038, 1046 (N.D. Cal. 2012) ("[T]o the extent that *Amex II*' s holding rested on the principle that a class waiver should be

unenforceable where the amounts at issue in the claims and the expense of prosecuting the claims would effectively preclude vindication of statutory rights . . . that argument has been soundly rejected by the Ninth Circuit's subsequent decision in *Coneff* . . . .").

In *Coneff*, the Ninth Circuit rejected the argument that "[small-dollar] claims . . . cannot be vindicated effectively [in arbitration] because they are worth much less than the cost of litigating them." 673 F.3d at 1158-59. The Ninth Circuit held that although it may be true that these types of "small-dollar claims" do not implicate sufficient incentives to vindicate plaintiffs' rights in arbitration—as opposed to "effective means" of doing so, i.e., through class actions—"[s]uch unrelated policy concerns, however worthwhile, cannot undermine the FAA." *Id.* at 1159.[3] The Supreme Court's recent ruling in Amex IV affirms the Ninth Circuit's approach. The Supreme Court explained that "the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy." *Amex IV*, ___ S. Ct. ___, 2013 WL 3064410, at *5.

Plaintiffs' arguments here are primarily based on evidence indicating that the costs of arbitration including

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[3] Although *Coneff* primarily address state law unconscionability defenses to the enforcement of an arbitration agreement, the court also held that the plaintiff's federal claim failed to meet the requirements under *Green Tree* to invalidate the arbitration agreement on the basis that it was prohibitively expensive. 673 F.3d at 1159 n.2 ("[B]ecause Plaintiffs raise at least one federal claim in their complaint, we decide the case with *Green Tree* in mind; Plaintiffs' federal claim fails under *Green Tree*.").

the attorney's fees end expert witness fees are much smaller in a class action lawsuit as compared to potential individual recovery in arbitration. *See* Opp'n 20. But these are precisely the arguments that the Supreme Court rejected in *Amex IV* and the Ninth Circuit rejected in *Coneff*. ___ S. Ct. ___, 2013 WL 3064410, at *5; 673 F.3d at 1159. Plaintiffs' arguments here also fail under the Supreme Court's broad language in *Concepcion* holding that: "Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 131 S. Ct. at 1748. Absent a clear statement in a federal statute demonstrating Congressional intent to override the use of arbitration, the FAA prevails. *Jasso*, 879 F. Supp. 2d at 1045 (citing *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012)).

The court in *Kaltwasser v. AT&T Mobility LLC* explained that the effective vindication of statutory rights doctrine (referred to as "Green Tree") may still be applicable in limited situations:

> If *Green Tree* has any continuing applicability [after *Concepcion*], it must be confined to circumstances in which a plaintiff argues that *costs specific to the arbitration process, such as filing fees and arbitrator's fees, prevent her from vindicating her claims*. *See Green Tree*, 531 U.S. at 90-91 & n.6, 121 S. Ct. 513. *Concepcion* forecloses plaintiffs from objecting to class-action waivers in arbitration agreements on the basis that the potential cost of proving a claim exceed potential individual damages.

812 F. Supp. 2d 1042, 1050 (N.D. Cal. 2011) (emphasis added); *Accord Amex IV*, ___ S. Ct. ___, 2013 WL 3064410, at *5 ("The 'effective vindication' exception . . . would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover *filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.*" (citing *Green Tree*, 531 U.S. at 90) (emphasis added)).

No prohibitively expensive costs "specific to the arbitration process, such as filing fees and arbitrator's fees," exist here. Here, EY expressly stipulated in its motion: (1) "that plaintiffs are entitled to recover in arbitration any fees and costs that they could recover in court if they prevail on their individual claims"; and (2) "that it [EY] will bear all administrative costs and arbitrator fees." Defs.' Br. 2. In its Reply brief, EY further stipulates "that should the plaintiffs prevail, they may recover any expert fees reasonably necessary to prosecute their individual claims, up to the $33,500 estimated by the proposed expert." Reply 13. EY's stipulations essentially eliminate any additional "costs specific to the arbitration process" that would render arbitration prohibitively expensive and that plaintiffs would not otherwise incur in litigation. *See Kaltwasser*, 812 F. Supp. 2d at 1049-50.

Morris provided an affidavit declaring his financial inability to pursue his claim in an individual arbitration. However, the court does not find plaintiffs' financial means, or lack thereof, to be outcome-determinative. Even if Morris were able to finance the arbitration costs, he retains no right to fee shifting if his statutory claims *fail*. *See* Part II.C *supra*. By seeking to invalidate the Arbitration Agreement's collective action waiver, the

plaintiff is essentially seeking a "risk of loss" premium. "[I]t is incorrect to read *Concepcion* as allowing plaintiffs to avoid arbitration agreements on a case-by-case basis simply by providing individualized evidence about the costs and benefits at stake." *Kaltwasser*, 813 F. Supp. 2d at 1049; *see also Amex IV*, ___ S. Ct. ___, 2013 WL 3064410, at *7 ("The regimen established by the Court of Appeals' decision would require—before a plaintiff can be held to contractually agreed bilateral arbitration—that a federal court determine (and the parties litigate) the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success. . . . The FAA does not sanction such a judicially created superstructure.").

In sum, plaintiffs fail to meet *Green Tree*'s burden of demonstrating that their statutory rights cannot be effectively vindicated through arbitration based solely on the risk of loss argument.

E. Waiver

Plaintiffs argue, relying primarily on *Van Ness Townhouses v. Mar Industries Corp.*, 862 F.2d 754 (9th Cir. 1989), that EY waived the right to arbitrate by pursuing and actively litigating their claims in state or federal court. According to plaintiffs, EY's actions in this case (transferring the action to this district) and in the *Ho* related cases (where Morris and McDaniel were putative class members) support a finding that EY waived its right to compel arbitration.

EY counters that "[i]t is well established that first moving to transfer an action does not relinquish a party's

right to compel arbitration." Reply 4 (citing *Gonsalves v. Infosys Techs., Ltd.*, 2010 WL 3118861, at *3 n.2 (N.D. Cal. Aug. 5, 2010) ("The California Supreme Court has held that '[a] petitioning party does not waive its arbitration rights merely by seeking to change judicial venue of an action prior to requesting arbitration. . . . [A] party is not required to litigate the issue of arbitration in an improper or inconvenient venue.'" (quoting *St. Agnes Med. Ctr. v. PacifiCare of Cal.*, 31 Cal. 4th 1187, 1205 (2003)). EY also argues that there is no waiver of the right to compel arbitration based on an action where Morris and McDaniel were not parties. EY contends that the court's determination of waiver in *Ho* cannot be binding here because the waiver ruling in *Ho* "turned on facts that were unique to the parties asserting a waiver in that case," primarily prejudice to plaintiffs Ho and Fernandez. Reply 7. Moreover, EY argues that the plaintiffs in this case cannot establish prejudice.

"A party seeking to prove waiver of a right to arbitration must demonstrate: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 693, 694 (9th Cir. 1986). "Any examination of whether the right to compel arbitration has been waived must be conducted in light of the strong federal policy favoring enforcement of arbitration agreements." *Id.* "The *Fisher* test applies to both express and implied waiver." *Van Ness*, 862 F.2d at 758.

Plaintiffs fail to meet the "heavy burden" required to prove waiver of the contractual right to arbitrate. *See Fisher*, 791 F.2d at 694. First, this court agrees that the

decision in *Ho* is not binding here because that case turned on whether those particular plaintiffs, Ho and Fernandez, were prejudiced. *Ho*, 2011 WL 4403625, at *6 ("[T]he prejudice to plaintiffs in this case goes well beyond the expenditure and duplication of effort claimed by the plaintiffs in *Fisher*. The parties' substantive rights have been affected."). Because no similar prejudice applies to Morris, the issues are not identical. *See Kamilche Co. v. United States*, 53 F.3d 1059, 1062 (9th Cir. 1995), as amended 75 F.3d 1391 (1996) (no collateral estoppel where issues are not identical). The court also agrees that neither Morris nor McDaniel, as putative class members, were parties to the *Ho* related cases litigation such that waiver applied to them. *See Mora v. Harley-Davidson Credit Corp.*, 2012 WL 1189769, at * 15 (E.D. Cal. Apr. 9, 2012) ("[U]ntil a class is certified and the opt-out period has expired, unnamed Class members are not parties to this action, and their claims are not at issue."); *Laguna v. Coverall North Am. Inc.*, 2011 WL 3176469, at *8 (S.D. Cal. July 26, 2011) (same). Plaintiffs cite no conduct by EY during the *Ho* litigation that evidences actions inconsistent with its intent to enforce arbitration with respect to Morris. Indeed, when Morris attempted to intervene in *Ho*, EY opposed plaintiff's motion to add Morris on the grounds that the motion was "futile, because if the [c]ourt granted it, [EY] *would move to compel Morris to arbitrate his claims.*" Defs.' Opp. to Mot. to Add a New Representative 19, *Ho*, No. 05-4867, Dkt. No. 316 (emphasis added). The court's waiver decision with respect to Ho and Fernandez—which the court rendered prior to Morris's motion to intervene in that case—simply has no bearing on EY's right to arbitrate with respect to Morris.

Second, the court agrees with EY that its motion to transfer does not waive its right to compel arbitration, especially here were EY voiced its intent to move to compel arbitration in the transfer motion itself. *See* Transfer Mot., Dkt. No. 25 at 2 n.1. EY also put Morris on notice of its intent to compel arbitration in its answer to Morris's complaint. Dkt. 30 at 19. Plaintiffs rely on cases from other circuits where courts have held that defendants waived their arbitration rights based on their own filing of a lawsuit or their removal of a lawsuit to federal court. Opp'n 11 (citing Fifth Circuit and Seventh Circuit cases). Plaintiffs also cite *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2011 WL 1753784, at *3 (N.D. Cal. May 9, 2011), where the court held that "multiple motions to dismiss" and failure to "raise the arbitration clauses in their joint opposition to class certification," waived any right to arbitration. These cases, however, are inapposite to the facts here, where EY consistently acted with the intent to compel arbitration as soon as Morris filed suit, and where EY has not filed any case dispositive motions.

Third, plaintiffs here have not demonstrated prejudice. In *Ho*, the court found that the parties suffered substantial prejudice because their "substantive rights ha[d] been affected—[EY] obtained summary judgment against Ho, and it was able to flesh out its 'poor employee' defense against Fernandez in the summary judgment motion it brought against her" which led the court to "conclud[e] that Fernandez is not an appropriate class representative." *Ho*, 2011 WL 4403625, at *6. In *Van Ness*, the appellate court held that the defendant "implicitly waived arbitration under the third prong of the *Fisher* test because the appellants were prejudiced by [defendant's] inconsistent acts," including "litigat[ing]

actively the entire matter—including pleadings, motions, and approving a pre-trial conference order" without "mov[ing] to compel arbitration until more than two years after the appellants brought the action." *Van Ness*, 862 F.2d at 759. In contrast to *Ho* and *Van Ness*, the instant action has been pending for less than a year, and plaintiffs only generally allege prejudice based on having to respond to EY's transfer motion and incurring litigation costs. EY has not served any discovery requests or made any motions as to the merits of plaintiffs' claims. In *Fisher*, under circumstances far more compelling than these with respect to a showing of prejudice, the Ninth Circuit held that the plaintiff failed to establish prejudice after investing "time, money, and effort" in responding to pretrial motions, preparing for trial, and conducting "extensive discovery" during three and a half years of litigation. 791 F.2d at 697. Plaintiffs cannot claim prejudice based on their own choice to sue in federal court, in violation of the Arbitration Agreement. *See id.* at 698 ("Any extra expense incurred as a result of the [plaintiffs'] deliberate choice of an improper forum . . . cannot be charged to [the defendant]."). Any such prejudice is "self inflicted," and EY has a right to seek transfer to move to compel arbitration in the proper forum. *See id.*

Accordingly, the court holds that EY did not waive its right to compel arbitration with respect to Morris.

F. Right to Collective Action Under the FLSA

Plaintiffs also attempt to rely on the FLSA's provision providing for collective action, 29 U.S.C. § 216(b), to argue that such a right is "substantive and not waivable in an arbitration agreement." Opp'n 25 (citing *Raniere v. Citigroup Inc.*, 827 F. Supp. 2d 294, 311 (S.D.N.Y. 2011)).

Section 216(b) provides that "[a]n action to recover the liability prescribed in [the Act] may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."

Under Supreme Court precedent, courts must "enforce agreements to arbitrate according to their terms," "unless the FAA's mandate has been overridden by a contrary congressional command." *CompuCredit*, 132 S. Ct. at 669. Plaintiffs depend on *Raniere* for the proposition that Congress intended the right to collective action under the FLSA to be nonwaivable. In that case, plaintiffs sought certification as a class in a suit for overtime wages and liquidated damages under the FLSA and the New York labor law. 827 F. Supp. 2d at 299. The *Raniere* court found that the legislative history of the FLSA evidenced congressional intent to for employees to have a nonwaivable right to collective action. *Id.* at 314 (citing legislative history indicating Congress's desire to "reduce[ ] the burden borne by the public fisc," 83 Cong. Rec. 9264, and to promote "uniformity with regard to the application of FLSA standards," H. Rep. No. 2182, 75th Cong., 3d Sess. at 6-7). The *Raniere* court held that a waiver of class action is thus "unenforceable as a matter of law" because, "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute [at issue].'" *Id.* (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

Despite *Raniere*'s analysis, every circuit court that has addressed the issue has held the opposite: that arbitration agreements *can* validly waive collective action because Congress did *not* intend to confer a nonwaivable

right to a class action under the FLSA. *See Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052 (8th Cir. Jan. 7, 2013) ("[T]he FLSA contains no 'contrary congressional command' as required to override the FAA."); *Carter v. Countrywide Credit Indus. Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) ("[W]e reject the Carter Appellants' claim that their inability to proceed collectively deprives them of substantive rights available under the FLSA."); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) ("[T]here is no suggestion in the text, legislative history, or purpose of the FLSA that Congress intended to confer a nonwaivable right to a class action under that statute."); *Horenstein v. Mortgage Mkt., Inc.*, 9 F. App'x 618, 619 (9th Cir. 2001) (same); *see also Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005) (holding that waiver of collective action in arbitration agreement was not unconscionable).

In *Gilmer*, the Supreme Court considered whether Congress intended to preclude a waiver of judicial resolution of claims brought under the Age Discrimination in Employment Act of 1967 ("ADEA"). 500 U.S. at 26-27. The Court rejected the plaintiff's argument that judicial enforcement of the ADEA was a nonwaivable right because, although the ADEA provided for a judicial forum, it "did not explicitly preclude arbitration or other nonjudicial resolution of claims." *Id.* at 29. Plaintiff specifically argued in *Gilmer* that the arbitration agreement there was inadequate under the ADEA because, *inter alia*, "arbitration procedures . . . do not provide for broad equitable relief and class actions." *Id.* at 32. Although the arbitral forum at issue in *Gilmer* (the New York Stock Exchange arbitration forum) actually did provide for collective proceedings, the Court nevertheless held: "'[E]ven if the arbitration could not go forward as a class

action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.'" *Id.* (quoting *Nicholson v. CPC Int'l Inc.*, 877 F.2d 221, 241 (3d Cir. 1989) (Becker, J., dissenting). The Court emphasized that "although all statutory claims may not be appropriate for arbitration, '[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" *Id.* at 26 (quoting *Mitsubishi*, 473 U.S. at 628).

The court finds the Supreme Court's reasoning in *Gilmer* equally applicable to the FLSA. Indeed, the ADEA expressly adopts the collective action procedures of the FLSA, 29 U.S.C. § 216(b). *See* 29 U.S.C. § 626(b); *Carter*, 362 F.3d at 298. The court here agrees with the various circuits concluding that nothing in the legislative history of the FLSA indicates Congressional intent to preclude arbitration of FSLA claims. As the Ninth Circuit found in *Horenstein*, "there is nothing in the text [of the FLSA], and plaintiffs have shown nothing in the legislative history, indicating that Congress intended to preclude arbitration of FLSA claims." 9 F. App'x at 619. The court disagrees with *Raniere* that the right to collective action under the FLSA is a substantive right. *Accord id.* ("Although plaintiffs who sign arbitration agreements lack the procedural right to proceed as a class, they nonetheless retain all substantive rights under the statute."). The court holds that Congress did not intend collective actions to be a substantive right under the FLSA, and that such a right may be waived as a part of a valid arbitration agreement.

G. Right to Collective Action Under Sections 7 and 8 of the NLRA

Plaintiffs also relies on the National Labor Relations Board's ("NLRB") decision in *D.R. Horton*, 357 N.L.R.B. No. 184 (2012), for the proposition that right to collective action is also nonwaivable under Sections 7 and 8 of the NLRA. In *D.R. Horton*, the NLRB determined that "an agreement that precludes [employees] from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial . . . unlawfully restricts employees' Section 7 right to engage in concerted action for mutual aid or protection, notwithstanding the [FAA], which generally makes employment-related arbitration agreements judicially enforceable." 357 NLRB No. 184 at 1. Both the Eighth Circuit and at least one district court in this circuit, however, have rejected the NLRB's interpretation of the NLRA on the grounds that it is inconsistent with the Supreme Court's interpretation of the FAA. *Owen*, 702 F.3d at 1054 (declining to defer to the NLRB's interpretation of Supreme Court precedent); *Jasso*, 879 F. Supp. 2d at 1047 ("[T]here is no language in the NLRA . . . demonstrating that Congress intended the employee concerted action rights therein to override the mandate of the FAA.").

In *Jasso*, the court held that "[b]ecause Congress did not expressly provide [in the NLRA] that it was overriding any provision in the FAA, the Court cannot read such a provision into the NLRA and is constrained by *Concepcion* to enforce the instant agreement according to its terms." 879 F. Supp. 2d at 1048. The court reasoned that "the broad language in *Concepcion* . . . articulates a strong policy choice in favor of enforcing arbitra-

tion agreements and thereupon holds that class waiver provisions should not be stricken or render the agreements unenforceable." *Id.* Here, the court declines to defer to the NLRB's interpretation of the NLRA in *D.R. Horton* because, although the NLRB is charged with interpreting the NLRA, it is *not* charged with interpreting the FAA. When an NLRB decision "trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield." *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 147 (2002). "[C]ourts do not owe deference to an agency's interpretation of a statute it is not charged with administering or when an agency resolves a conflict between its statute and another statute." *Ass'n of Civilian Technicians, Silver Barons Chapter v. Fed. Labor Relations Auth.*, 200 F.3d 590, 592 (9th Cir. 2000). Based on "the strong policy favoring arbitration [whereby] doubts are to be resolved in favor of the party moving to compel arbitration," *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983), the court declines to defer to the NLRB's decision in *D.R. Horton*.

III. ORDER

For the foregoing reasons, the court **GRANTS** EY's motion to compel arbitration. At oral argument, the parties agreed that if the court grants the motion to compel arbitration the case should be dismissed. Because arbitration is required for every claim, the court dismisses, rather than stays, the case. *See Sparling*, 864 F.2d at 638.

Dated: July 9, 2013

/s/ Ronald M. Whyte
RONALD M. WHYTE
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA
SAN JOSE DIVISION

No. 12-04964-RMW

STEPHEN MORRIS and KELLY MCDANIEL, on behalf of themselves and all others similarly situated,
Plaintiffs,

v.

ERNST & YOUNG LLP, and
ERNST & YOUNG U.S., LLP, Defendants.

Filed: July 23, 2013

On July 9, 2013, the court granted defendants Ernst & Young and Ernst & Young U.S., LLP's (collectively "Ernst & Young") motion to dismiss and compel arbitration. Order, Dkt. No. 63. Accordingly, the court enters judgment in favor of Ernst & Young and against plaintiffs. Plaintiffs shall take nothing by way of their complaint.

Dated: July 23, 2013

/s/ Ronald M. Whyte
RONALD M. WHYTE
United States District Judge

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
DEC - 6 2016
OFFICE OF THE CLERK

No. 16-300

In the Supreme Court of the United States

ERNST & YOUNG LLP AND ERNST & YOUNG U.S. LLP,
PETITIONERS

v.

STEPHEN MORRIS AND KELLY MCDANIEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Supreme Court of the United States

No. 16-300

ERNST & YOUNG LLP AND ERNST & YOUNG U.S. LLP,
PETITIONERS

v.

STEPHEN MORRIS AND KELLY MCDANIEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Rarely does a question presented so cry out for this Court's review. There are currently multiple petitions for certiorari pending from four different circuits on the question whether a provision in an employment agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis is enforceable. The parties in those cases, their respective amici, and disinterested commentators overwhelmingly agree that the question is exceptionally important, that the circuits are irreconcilably divided, and that the Court's immediate intervention is necessary. The parties disagree not about whether review is warranted, but only about which of the cases the Court should take.

Petitioners respectfully submit that this case is the best vehicle for resolution of the circuit conflict. This case presents a dispute over arbitrability in the context of a private lawsuit brought by employees against their employer—and, as such, avoids the collateral difficulties that would accompany review of an enforcement action by the National Labor Relations Board. This case squarely presents the question; it features thorough competing opinions from the court of appeals; and it involves an arbitration provision that is itself the subject of a circuit conflict. There is no benefit to granting review in any of the other pending cases. The petition for certiorari should therefore be granted, and the other petitions held pending the disposition in this case.

A. A Private Lawsuit Is The Superior Vehicle For Resolving The Question Presented

A private lawsuit between employees and their employer is the best vehicle for determining whether an employment agreement that requires an employee to arbitrate claims against an employer on an individual basis is enforceable. To begin with, the question arises most frequently in private lawsuits, not NLRB enforcement actions. See, *e.g.*, Pet. App. 2a-3a; *Patterson* v. *Raymours Furniture Co.*, No. 15-2820, 2016 WL 4598542, at *2 (2d Cir. Sept. 2, 2016) (summary order), petition for cert. pending, No. 16-388 (filed Sept. 22, 2016); *Lewis* v. *Epic Systems Corp.*, 823 F.3d 1147, 1155, 1157-1159 (7th Cir. 2016), petition for cert. pending, No. 16-285 (filed Sept. 2, 2016); *Sutherland* v. *Ernst & Young LLP*, 726 F.3d 290, 292-293 (2d Cir. 2013) (per curiam); *Owen* v. *Bristol Care, Inc.*, 702 F.3d 1050, 1051-1052 (8th Cir. 2013).

In the context of private lawsuits, moreover, the question is a pure one of statutory interpretation: does

Section 7 of the National Labor Relations Act prohibit the enforcement of the agreement at issue under Section 2 of the Federal Arbitration Act? To answer that question, a reviewing court need only consider the meaning of those two provisions and how they interact.

The analysis is more complicated, however, in an enforcement action by the NLRB. There, the dispositive question is not how Section 2 of the FAA interacts with Section 7 of the NLRA. Instead, the question is whether an employer has committed an "unfair labor practice" under Section 8(a)(1) of the NLRA by "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise" of a Section 7 right. 29 U.S.C. 158(a)(1). That is reflected in the NLRB's formulation of the question presented in its petition for certiorari in *NLRB* v. *Murphy Oil USA, Inc.*, No. 16-307 (filed Sept. 9, 2016). See Pet. at i.

That is a distinction with a considerable difference, as *Murphy Oil* itself illustrates. There, the NLRB ruled that the employer had violated Section 8 in two ways: by requiring individualized arbitration and by enforcing the arbitration provision. 361 N.L.R.B. No. 72, 2014 WL 5465454, at *24-*28 (Oct. 28, 2014), enforcement denied in part, 808 F.3d 1013 (5th Cir. 2015). To uphold either of those rulings, the Court would have to consider collateral issues that do not exist in private lawsuits.

As to violating Section 8 by requiring individualized arbitration: in *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2280 (2012), enforcement denied in part, 737 F.3d 344 (5th Cir. 2013), the NLRB determined that requiring individualized arbitration is itself an unfair labor practice because it "reasonably tends to chill employees in the exercise of their Section 7 rights." *Martin Luther Memorial Home, Inc.*, 343 N.L.R.B. 646, 646 (2004). That ruling raises three questions independent from the in-

terplay between Section 7 of the NLRA and Section 2 of the FAA. First, does the NLRB's "reasonably tends to chill" standard comport with Section 8 of the NLRA or warrant deference? See *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527, 536 (1992). Second, does the NLRB's *application* of that standard to employment agreements requiring individualized arbitration warrant deference? See *Allentown Mack Sales & Service, Inc.* v. *NLRB*, 522 U.S. 359, 366-367 (1998). Third, does substantial evidence support the NLRB's case-specific decision? See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477-490 (1951). For the NLRB to prevail in *Murphy Oil*, the Court would have to answer at least some of those questions, in addition to the straightforward question of statutory interpretation presented in private lawsuits such as this one.

As to violating Section 8 by enforcing the arbitration provision: the NLRB's ruling on that point raises an even thornier set of collateral issues. *Murphy Oil* was originally a collective action filed by employees against the employer in the United States District Court for the Northern District of Alabama. After the employer filed a motion to compel arbitration, the district court granted the motion and dismissed the employees' case. See *Murphy Oil USA, Inc.* v. *NLRB*, 808 F.3d 1013, 1015-1016 (5th Cir. 2015). In the meantime, the NLRB conducted an enforcement proceeding against the employer, ultimately ruling that the employer violated Section 8 of the NLRA by successfully enforcing its arbitration provision. See *ibid.*

That ruling raises serious constitutional concerns. An employer's ability to seek judicial relief against its employees—here, in the form of a motion to compel arbitration—implicates the First Amendment's Petition Clause. See *Bill Johnson's Restaurants, Inc.* v. *NLRB*,

461 U.S. 731, 744 (1983). As a result, an employer's lawsuit against its employees cannot constitute an unfair labor practice unless the lawsuit is objectively baseless. See *BE&K Construction Co.* v. *NLRB*, 536 U.S. 516, 533 (2002). This Court has implied (though not expressly held) that the lawsuit must also be motivated by retaliatory intent. See *id.* at 528-533; *id.* at 537 (Scalia, J., concurring).

Those concerns substantially complicate the *Murphy Oil* petition. In order to determine how the Petition Clause affects that case, the Court would need to engage in a multi-step analysis. First, it would need to decide whether filing a motion to compel arbitration implicates the Petition Clause. If the answer is yes, the Court would have to consider whether the motion in *Murphy Oil*—and, *a fortiori*, the district court's order granting the motion and compelling individual arbitration—was objectively baseless. The Court would also need to decide whether the employer acted with a retaliatory motive—and, if not, whether Petition Clause protection applies when an employer does not intend to retaliate. If the Petition Clause applies, it would present a threshold barrier to the question presented here: namely, whether Section 7 of the NLRA prohibits the enforcement of such an arbitration provision under Section 2 of the FAA. At a minimum, the threshold analysis would be difficult and complex.

In marked contrast, private cases are simpler and cut to the heart of the circuit conflict. Every private case in the conflict has focused directly on the interplay between Section 7 of the NLRA and Section 2 of the FAA. See Pet. App. 3a-42a; *Patterson*, 2016 WL 4598542, at *1-*3; *Lewis*, 823 F.3d at 1151-1161; *Owen*, 702 F.3d at 1052-1055; *Sutherland*, 726 F.3d at 296-299 & n.8. That is the

question on which the Court should grant review, and it is squarely and cleanly presented here.[1]

B. The NLRB's Presence As A Party Would Not Be Beneficial

The NLRB contends that *Murphy Oil* is a superior vehicle because "the [NLRB] is a party and is able to defend more directly its construction" of the NLRA. 16-307 Pet. 22 n.9. That contention does not withstand scrutiny.

To begin with, there is nothing the NLRB could add as a party that would assist the Court in analyzing the interaction between the FAA and the NLRA. The NLRB does not administer the FAA, and this Court has "never deferred to the [NLRB's] remedial preferences" when it comes to "federal statutes and policies unrelated to the NLRA." *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 144 (2002). Tellingly, no court of appeals to address the question presented has rested its holding on deference to the NLRB's position. See Pet. App. 11a & n.5; *Lewis*, 823 F.3d at 1153; *D.R. Horton*, 737 F.3d at 362; *Sutherland*, 726 F.3d at 297 n.8; *Owen*, 702 F.3d at 1053-1054.

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[1] Respondents identify only one collateral question that could potentially arise in a private case such as this one: namely, whether Section 3 of the Norris-LaGuardia Act, 29 U.S.C. 103, prevents federal courts from granting an employer's motion to compel arbitration. See Resp. Br. 15-17. That question is an entirely discrete (and logically subsequent) one; it does not go to a court's jurisdiction and thus does not present a threshold obstacle to this Court's review. See 29 U.S.C. 103. In addition, as respondents concede (see Resp. Br. 15), the court of appeals in this case did not address that question, and no conflict exists on that question because no court of appeals has accepted respondents' view of the scope of Section 3. See *Owen*, 702 F.3d at 1053; *D.R. Horton*, 737 F.3d at 362 n.10.

In any event, even if the NLRB were entitled to deference, the government could express its views equally well as an amicus curiae in a private case such as this one. As the NLRB acknowledges, it did just that in the court of appeals both in this case and in *Lewis*, *supra*. See 16-307 Pet. 22 n.9, 23 n.10. The NLRB does not contend that the government would have an inadequate opportunity to be heard through participation as an amicus, as it routinely does even in cases where its interest is substantial.

Indeed, it may actually be preferable to grant review in a case where the government participates as an amicus curiae, rather than the NLRB as a party, because the government's position on arbitration provisions in employment agreements may shift as a result of the impending change in administrations. See Alison Frankel, *How Trump DOJ Could Upend One of the Biggest Business Cases Facing SCOTUS*, Reuters (Nov. 22, 2016) <tinyurl.com/reuters-doj-arbitration>. The NLRB's position may also shift, as it has two vacancies that will likely be filled by the new President. See *ibid.*; Jeffrey M. Tanenbaum, Stacie B. Collier & Traci-Bernard Marks, *Trumping Obama's Employment Law Legacy*, Law360 (Nov. 16, 2016) <tinyurl.com/law360-labor-law>; Janette Levey Frisch, *Could the President-Elect Trump Recent NLRB Rulings?*, EmpLAWyerologist (Nov. 10, 2016) <tinyurl.com/recent-nlrb-rulings>; Jacob Gershman, *Trump Poised To Reshape Labor Board, Lawyers Say*, Wall St. J. Law Blog (Nov. 14, 2016) <tinyurl.com/nlrb-vacancies>. Granting review in a private case would afford the government the opportunity to express its views, taking into account any effect from the change in administrations, in a single amicus brief on behalf of the United States.

C. As Among The Private Cases Currently Pending, This Case Is The Best Vehicle For Resolving The Question Presented

Finally, this is the optimal private case in which to consider the interaction between the FAA and the NLRA. As a preliminary matter, the question presented in this case is broadly worded: whether the collective-bargaining provisions of the NLRA prohibit the enforcement under the FAA of an agreement requiring an employee to arbitrate claims on an individual, rather than collective, basis. That question encompasses all arguments related to (1) whether the NLRA contains a congressional command contrary to individual, rather than collective, arbitration; (2) whether the NLRA creates a substantive, non-waivable right to class proceedings in the employment context; and (3) whether the NLRA renders employment agreements requiring individual arbitration unenforceable under the saving clause in Section 2 of the FAA. The question presented here thus enables the parties to present the full range of relevant arguments to the Court.

In addition, there are no impediments to the Court's resolving the question presented in this case. The question presented was obviously pressed and passed upon below; indeed, it formed the sole basis for the court of appeals' decision.[2] And unlike in any other case in the

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[2] The petitioner in *Epic Systems Corp.* v. *Lewis*, No. 16-285, suggests that its case is the better vehicle because the decision below in that case "identified, considered, and ruled on only the question presented," and also because petitioners' arbitration agreement in this case requires the parties to mediate before proceeding to arbitration. See 16-285 Reply Br. 11-12. But that is mere window dressing. The court of appeals' decision in this case also addressed only one question relating to arbitration: whether the collective-bargaining

circuit conflict, the majority and dissenting opinions below fully develop the arguments on both sides of the question. No other opinions have so clearly and thoroughly framed the competing arguments. While the Court will certainly have the benefit of those opinions regardless, the very fact of such detailed competing opinions provides assurance that there are no lurking vehicle problems.

Perhaps most importantly, the circuit conflict at hand affects petitioners in a particularly acute way, making this case a uniquely compelling vehicle to resolve the question presented. Virtually all of petitioners' 40,000 employees agreed to the arbitration provision at issue here as a condition of employment. That provision is itself the subject of a circuit conflict, with the Second Circuit holding that it is valid and the Ninth Circuit holding that it is not. Compare *Sutherland*, 726 F.3d at 297 n.8, with Pet. App. 24a.

The existence of that EY-specific circuit conflict is reason enough why the Court cannot afford to wait to resolve the question presented, and it is also a reason why the Court should grant review in this case. Petitioners' ability to enforce their uniform, nationwide arbitration provision depends on where a given employee is located (or where the employee files suit). Petitioners thus have a particularly strong interest in defending the validity of provisions requiring an employee to arbitrate claims against an employer on an individual basis. The fact that petitioners' arbitration provision has itself di-

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provisions of the NLRA prohibit the enforcement under the FAA of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis. See Pet. App. 24a-25a. There is thus no valid reason to grant review in *Epic Systems* rather than in this case.

vided the circuits provides the added benefit of avoiding any problems arising from peculiarities in the language or method of adoption of less widely used agreements. For that reason, and for the reasons set out above, granting review in other cases would merely add complications without any offsetting benefit.

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

ERNST & YOUNG LLP AND
ERNST & YOUNG U.S. LLP,
Petitioners,

v.

STEPHEN MORRIS AND KELLY MCDANIEL,
Respondents.

On a Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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October 2016

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QUESTION PRESENTED

Whether the collective-bargaining provisions of the National Labor Relations Act prohibit the enforcement under the Federal Arbitration Act of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, *amicus curiae* Atlantic Legal Foundation states that Atlantic Legal Foundation is a not-for-profit corporation incorporated under the laws of the Commonwealth of Pennsylvania. It has no shareholders, parents, subsidiaries or affiliates.

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INTEREST OF *AMICUS CURIAE*[1]

The Atlantic Legal Foundation is a non-profit public interest law firm founded in 1976 whose mandate is to advocate and protect the principles of less intrusive and more accountable government, a market-based economic system, and individual rights. It seeks to advance this goal through litigation and other public advocacy and through education. Atlantic Legal Foundation's board of directors and legal advisory council consist of legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists. Atlantic Legal's directors and advisors are familiar with the role arbitration clauses play in the contracts entered into between companies and between companies and consumers. Some of Atlantic Legal's directors and advisers have decades of experience with arbitration – as legal counsel, as arbitrators, and as members or supporters of organizations that administer

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[1] Pursuant to Rule 37.2(a), *amicus* has given notice of intent to file this brief to all parties more than 10 days before this brief was filed. All parties have consented to the filing of this brief.; the consents have been lodged with the Clerk.

Pursuant to Rule 37.6, *amicus* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* nor their counsel made a monetary contribution to the preparation or submission of this brief.

arbitration regimes. They are familiar with the benefits of arbitration, especially the role of arbitration (and other "alternative dispute resolution" mechanisms) in facilitating business and commerce and in alleviating the burdens on courts and parties.

The abiding interest of the Foundation in the promotion of arbitration as an efficient alternative to protracted litigation is exemplified by its participation as *amicus* or as counsel for *amicus* in numerous cases before this Court, involving arbitration issues, including *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) and *DIRECTV, INC. v. Imburgia*, 136 S. Ct. 463 (2015). The Foundation has also filed an *amicus* brief in support of petitioner in *Epic Systems Corp. v. Lewis*, No. 16-285, which raises issues very similar to the issues in this case.

PRELIMINARY STATEMENT

The FAA establishes a presumption in favor of enforcing arbitration agreements as written[2] that can be overcome by another statute, but only if that statute is a "congressional command" that is contrary to the FAA's mandate.

The Ninth Circuit in this case, 2016 WL 4433080 (9th Cir. Aug. 22, 2016), and the Seventh Circuit, in *Lewis v. Epic Systems Corp.* 823 F.3d

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[2] Section 2 of the Federal Arbitration Act (FAA), arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

1147 (7th Cir. 2016), held that the NLRA is a "congressional command" that creates an exception to the FAA's promotion of arbitration as a preferred means of dispute resolution.[3] The Fifth Circuit, in *Murphy Oil, U.S.A., Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), petition for cert. pending, No. 16-307 (filed Sept. 9, 2016) held that the NLRA is not an unambiguous "congressional command," and that it did not fall within the FAA's "saving clause" of "illegality."

Petitioners in all three cases – employers and the NLRB (charged with protecting the interests of employees) – argue in strikingly similar language that whether an employer can lawfully require its employees to sign agreements mandating individual arbitration of workplace disputes "is an important and recurring question" about the federal policy encouraging arbitration embodied in the Federal Arbitration Act and the scope of employees' rights under the NLRA. See Ernst & Young Petition at 10, Epic System Petition in No. 16-285 at 4, and NLRB Petition in No. 16-307 at 9.

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[3] Section 7 of the National Labor Relations Act (NLRA) provides that "[e]mployees shall have the right to self-organization * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. And under Section 8(a) of the NLRA, it is an unfair labor practice for an employer to "interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights. 29 U.S.C. § 158(a).

The NLRB's petition in *Murphy Oil* and the employers' petitions in this case and in *Epic Systems* diverge primarily in their respective positions on the substantive issue in each case.

This Court is being asked to resolve a clear circuit split arising from contrary conclusions drawn recently by several circuit courts of appeal about whether class and collective action waivers in employment arbitration agreements violate the National Labor Relations Act, and whether the NLRA overrides the Federal Arbitration Act in three petitions for certiorari filed in September 2016, in the instant case, in *Epic Systems Corp. v. Lewis*, No. 16-285 (docketed Sept. 2, 2016) and in *NLRB v. Murphy Oil*, No. 16-307 (docketed Sept. 9, 2016). The filing of three petitions with this Court in such a short period of time by both employers and the NLRB, involving very similar legal and factual issues, is evidence of the importance of the issues and the need for the Court to determine the scope of employers' and employees' rights as applied to arbitration agreements that contain a waiver of the right to engage in class litigation or class arbitration under the FAA and the NLRA, the two federal statutory schemes at issue.

The outcome of these cases has far-reaching implications for employers and employees across the United States. If the Seventh and Ninth Circuits' rule stands, employers doing business in those circuits will be subject to a different legal regime than employers with employees in the

Second, Fifth, and Eighth Circuits. If this Court does not resolve the circuit split and establish a uniform nationwide rule, employers in other circuits that have not ruled on the issue, and even employers in the Second, Fifth, and Eighth Circuits, and face the real threat of class litigation or enforcement action before NLRB administrative tribunals.

BACKGROUND

Respondents were employees in petitioners' audit division. See App. 45a. of petitioners. Petitioners are related international accounting, auditing and consulting firms. Each respondent signed an employment agreement that included an arbitration provision requiring all employment related disputes be resolved in individual, rather than collective, arbitration. Virtually all of petitioners' thousands of employees in the United States have signed an arbitration provision as a condition of employment.[4]

Respondent Morris filed a class-action lawsuit against petitioners in federal court (which

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[4] The arbitration provision states, in relevant part, "All claims, controversies or other disputes between [petitioners] and an Employee that could otherwise be resolved by a court" will be resolved through a program of alternative dispute resolution known as the "Common Ground Dispute Resolution Program." Under the program, "Covered Disputes pertaining to different [e]mployees will be heard in separate proceedings"; class or collective proceedings are not permitted. App. 44a.

respondent McDaniel later joined) alleging that petitioners had mis-classified them and other employees for purposes of overtime pay under the Fair Labor Standards Act (FLSA) and California law. Petitioners moved to compel arbitration. The district court granted the motion, holding that the arbitration provision was enforceable. App. 43a-67a.

A divided panel of the Ninth Circuit reversed.

The Ninth Circuit Decision

A divided panel of the court of appeals reversed and remanded. App. 1a-42a. The court of appeals began its analysis with the NLRA, and, citing case law construing Section 7 of the NLRA, concluded that Section 7 "protects a range of concerted employee activity, including the right to seek to improve working conditions through resort to administrative and judicial forums," App. 7a (internal quotation marks and citation omitted), and establishes a "substantive right" for employees "to pursue work-related legal claims, and to do so together." App. 8a, 10a.

Petitioners' arbitration provision, the majority held, "prevents concerted activity by employees in arbitration proceedings, and the requirement that employees only use arbitration prevents the initiation of concerted legal action anywhere else." App. 11a. Thus, the majority held, the arbitration provision interferes with "a protected § 7 right in violation of § 8" and "[t]hus, the 'separate proceedings' terms in the Ernst & Young contracts cannot be enforced." *Id.*

The court of appeals stated that the FAA "does not dictate a contrary result," App. 12a, "[t]he illegality of the 'separate proceedings' term here has nothing to do with arbitration as a forum," App. 13a, and "[i]rrespective of the forum in which disputes are resolved, employees must be able to act in the forum together," App. 23a (emphasis in original). The Ninth Circuit majority concluded that petitioners' arbitration provision was prohibited by the NLRA and thus unenforceable, App. 16a, 24a, under the FAA's saving clause, which provides that an arbitration agreement is enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2.

The majority "recognize[d] that our sister Circuits are divided on this question," and acknowledged that the majority of the courts of appeal that have considered the issue have ruled the other way (citing *Murphy Oil v. NLRB*, 808 F.3d at 1018; *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013); and *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053-54 (8th Cir. 2013), and agreed with the Seventh Circuit, the only one that "has engaged substantively with the relevant arguments." App. 24a n.16. The court of appeals specifically rejected the analytical framework of the courts of appeal which reached the conclusion that requires an identifiable "contrary congressional command" in a statute in order to override the FAA's mandate to enforce arbitration agreements. App. 17a.

Judge Ikuta dissented. App. 25a-42a. She cogently wrote that "This decision is breathtaking in its scope and in its error; it is directly contrary to Supreme Court precedent App. 25a, because "[c]ontrary to the majority's focus on whether the NLRA confers 'substantive rights,' in every case considering a party's claim that a federal statute precludes enforcement of an arbitration agreement, the Supreme Court begins by considering whether the statute contains an express 'contrary congressional command' that overrides the FAA." App. 29a and that the NLRA contained nothing "remotely close" to a "contrary congressional command" that mention arbitration nor specify the right to take legal action at all, whether individually or collectively." App. 35a.

Judge Ikuta also rejected the majority's reliance on the FAA's saving clause. See App., *infra*, 38a-41a. She contended that the majority's reasoning was based on the erroneous premise that collective-action waivers are illegal, when, in reality, such a waiver "would be illegal only if it were precluded by a 'contrary congressional command' in the NLRA, and here there is no such command." App. 40a. Judge Ikuta further reasoned that, even if the NLRA could be interpreted as "giving employees a substantive, nonwaivable right to classwide actions, such a purported right would "disproportionately and negatively impact arbitration agreements by requiring procedures that 'interfere[] with fundamental attributes of arbitration.'" *Id.*

(quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 at 344 (2011), which "expressly rejected" the reasoning behind the majority's conclusion that "the nonwaivable right to class-wide procedures [that the majority] has discerned in [Section] 7" complies with the FAA simply because it "applies equally to arbitration and litigation." *Id.*

Judge Ikuta concluded by observing that the majority's rule was "directly contrary to Congress's goals in enacting the FAA." App. 40a and the majority "exhibit[ed] the very hostility to arbitration that the FAA was passed to counteract." App. 41a.

The Ninth Circuit majority recognized that its ruling is at odds with decisions of three other courts of appeals – including a decision of the Second Circuit involving then same defendants (petitioners here) – which held that the identical arbitration provision at issue here is enforceable, *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013).

SUMMARY OF ARGUMENT

The split among several circuits on the question whether arbitration clauses that require employment-related disputes are to be resolved by individual arbitration are enforceable, or whether the NLRA overrides the FAA's presumption that arbitration agreements are enforceable as written, is clear, acknowledged, and undisputed. Indeed, the two circuits that have held arbitration agreements in the labor-relations context are

unenforceable acknowledge the clear circuit split. All of the petitioners in the three cases now pending before the Court that raise this issue – employers and the NLRB alike – agree that there is a direct and serious circuit split. Likewise, all three petitions pending before the Court raising the issue presented in this case – from employers and the NLRB – agree that the circuit split is fully developed and ripe for resolution by this Court.

Review is also warranted because the decision below was incorrect. It ignores this Court's teaching that the FAA embodies "a liberal federal policy favoring arbitration agreements," and that arbitration agreements must be enforced according to their terms, that the foregoing principles apply even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command that is expressed with "clarity."

ARGUMENT

I. THERE IS AN ACKNOWLEDGED AND INDISPUTABLE SPLIT OF AUTHORITY AMONG THE CIRCUITS ON THE QUESTION PRESENTED.

The split of authority in this case is clear, acknowledged, and undisputed. The federal courts of appeals are divided on whether the NLRA overrides the FAA's presumption that arbitration agreements which require that employment-related disputes be resolved by individual arbitration are enforceable as written.

Indeed, the two circuits that have held arbitration agreements in the labor-relations context are unenforceable acknowledge a clear circuit split. All of the petitioners in the three cases now pending before the Court that raise this issue – employers and the NLRB alike – agree that there is a serious and direct circuit split.

The Second, Fifth, and Eighth Circuits have held that arbitration agreements that incorporate waivers of class and collective arbitration and litigation in the employment context are enforceable under the FAA.[5] The most direct conflict is between the Ninth Circuit's decision below and the Second Circuit's ruling in *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013) (per curiam), which held, contrary to the Ninth Circuit, that the very Ernst & Young arbitration clause at issue here *is* enforceable under the FAA. *Id.* at 292-293, 299 (citing *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013)).

The Second Circuit began from the premise that "arbitration agreements should be enforced according to their terms unless the FAA's mandate has been overridden by a contrary congressional

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[5] The Sixth and Eleventh circuits have also held that the FAA requires enforcement of class waivers in employment arbitration agreements, but did not discuss the NLRA in those decisions. *See Killion v. KeHE Distribs., LLC*, 761 F.3d 574, 592 (6th Cir. 2014); *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1334-1336 (11th Cir. 2014).

command." 726 F.3d at 295 (internal quotation marks and citation omitted). The Second Circuit found that neither the FLSA nor the NLRA was a "contrary congressional command" that overrode the FAA. *Id.* at 296-297 & n.8. The Second Circuit reached this conclusion even though the NLRB had ruled otherwise; the court "decline[d] to follow" the Board's views. *Id.* at 297 n.8. The Second Circuit has very recently followed its *Sutherland* precedent in *Patterson v. Raymours Furniture Co.*, No. 15-2820, 2016 WL 4598542 (2d Cir. Sept. 2, 2016) (summary order).

The Fifth Circuit has upheld class waivers in employment-related arbitration agreements. In *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013), that court overrode a decision by the National Labor Relations Board ("NLRB" or "Board"), which had found the class waiver at issue unenforceable under the FAA and the NLRA. *See D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012).

The Fifth Circuit analyzed the issue following the schema adopted by this Court in cases in which a party seeks to avoid arbitration on the basis of a purported conflict with another federal statute. The Fifth Circuit asked whether the NLRA is "a contrary congressional command" that overcomes the FAA's presumption in favor of arbitration. *Id.* (citing *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). The Fifth Circuit determined that "there is no basis on which to find that the text of the NLRA supports a congressional command to override the FAA." *Id.*

The Fifth Circuit rejected the NLRB's decision that the FAA's saving clause was a basis for invalidating class waivers because of alleged "illegality" under the NLRA. 737 F.3d at 360 because the Board's finding of "illegality" had "the effect of * * * disfavor[ing] arbitration," *id.* at 359 (citing *Concepcion*, 563 U.S. 333, 346 (2011)).

The Fifth Circuit has adhered to this view in the face of repeated challenges by the NLRB after its decision in *D.R. Horton*. *See Citi Trends, Inc. v. NLRB*, No. 15-60913, 2016 WL 4245458, at *1 (5th Cir. Aug. 10, 2016) (per curiam) (unpublished); *PJ Cheese, Inc. v. NLRB*, No. 15-60610, 2016 WL 3457261, at *1 (5th Cir. June 16, 2016) (per curiam); and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1021 (5th Cir. 2015), petition for cert. pending, No. 16-307 (filed Sept. 9, 2016).

In *Murphy Oil*, the Fifth Circuit again addressed the alleged illegality of arbitration agreements under Sections 7 and 8(a) of the NLRA and again upheld the enforceability of an arbitration agreement that contains a waiver of the right to commence or participate in class-wide arbitration or litigation.

Murphy Oil's original arbitration agreement[6] provided that employees must individually resolve

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[6] After the Fifth Circuit's *D.R. Horton* decision Murphy Oil revised its arbitration agreement to include language stating that the agreement did not bar employees from "'participating in proceedings to adjudicate unfair labor practice[] charges before the Board."

any and all disputes or claims which relate to the employment relationship by binding arbitration. Several employees filed an FLSA collective action. Murphy Oil moved to dismiss the suit and to compel arbitration.

One of the plaintiff employees also filed an unfair labor charge with the NLRB, alleging that the arbitration agreement unlawfully interfered with employees' Section 7 rights. In October 2014, ten months after the Fifth Circuit's ruling in *D.R. Horton*, the NLRB issued its opinion, in *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (2014). The Board disregarded the Fifth Circuit's ruling in *D.R. Horton* and, applying its own *D.R. Horton* decision and not the Fifth Circuit's *D.R. Horton* ruling, reaffirmed its position that arbitration provisions that waived the right to class relief violated the NLRA because the agreement restricted the Section 7 right to engage in concerted activity. The NLRB ruled that both the original and amended Murphy Oil arbitration language could be interpreted as unlawfully prohibiting employees from filing unfair labor practice charges.

Murphy Oil petitioned the Fifth Circuit to review the NLRB's ruling that ignored the Fifth Circuit's *D.R. Horton* decision. The Fifth Circuit held in *Murphy Oil* that the original arbitration agreement violated employees' Section 7 rights, but that the amended agreement was lawful. The court considered Murphy Oil's pre- and post- *D.R. Horton* versions of the arbitration agreement and

concluded that the original agreement was problematic because its language that employees waived the right to pursue collective or class claims for could be interpreted to mean that the employee could not file unfair labor practice charges with the NLRB, could therefore had a chilling effect on employees' ability to act collectively, and thus constitute an unfair labor practice.

However, the Fifth Circuit held that Murphy Oil's revised arbitration agreement did not violate the NLRA because an employee could not reasonably interpret the revised agreement to prohibit filing unfair labor practice charges because the agreement clearly stated the opposite. The Fifth Circuit held that individual arbitration agreements are not a per se unfair labor practices and held further that "an express statement" preserving employees' right to file Board charges is not required. See NLRB Petition in *Murphy Oil*, No. 16-307, Pet.App. 11a.

The Eighth Circuit also has concluded that arbitration agreements containing class waivers are enforceable under the FAA, notwithstanding federal labor laws or the NLRB's interpretation of those laws. See *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052, 1054-1055 (8th Cir. 2013) and *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 776 (8th Cir. 2016).

In *Owen*, the Eighth Circuit acknowledged the NLRB's determination that class waivers in employment arbitration agreements are

unenforceable, but explicitly "reject[ed]" the "invitation to follow the NLRB's rationale." 702 F.3d at 1055, and instead found the FAA's presumption in favor of the enforcement of arbitration agreements to be dispositive. *See id.* at 1052-1055. The Eighth Circuit followed this Court's teaching that "there must be a 'contrary congressional command' for another statute to override the FAA's mandate." *Id.* at 1052 (quoting *CompuCredit*, 132 S. Ct. at 669), and found that the two potential contrary congressional enactments cited by the employees in *Owen* – the FLSA and the NLRA – did not constitute such a "contrary congressional command." *Id.* at 1053-1054. The Eighth Circuit concluded that neither labor statute overrode "the mandate of the FAA in favor of arbitration." *Id.* at 1055. The Eighth Circuit noted that Congress had reenacted the FAA in 1947, *after* passing both of the labor statutes, and that "Congress intended its arbitration protections to remain intact even in light of the earlier passage" of the labor relations statutes. *Id.* at 1053.

The Eighth Circuit reaffirmed its *Owen* decision earlier this year in *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772 (8th Cir. 2016), in which it reviewed an NLRB ruling that a mandatory agreement requiring individual arbitration of work-related claims violates the NLRA. *Id.* at 776. The court adhered to its decision in *Owen*, which, it said, "is fatal" to the NLRB's position. The court held that an "arbitration agreement that include[s]

a waiver of class or collective actions in all forums to resolve employment-related disputes" is enforceable. *Id.*

On the other side of the circuit split, the Seventh Circuit expressly recognized that its ruling "would create a conflict in the circuits." *Lewis v. Epic Systems Corp.* 823 F.3d 1147, n. † (7th Cir. 2016), Pet. App. in *Epic Systems v. Lewis*, No. 16-285, at 15a n †. Unlike the Second, Fifth, and Eighth Circuits, the Seventh Circuit held that agreements to submit employment disputes to individual arbitration are not enforceable. That court, like the Ninth Circuit here, concluded that class waivers in employment arbitration agreements are "illegal" under the NLRA because they interfere with employees' right to engage in concerted activities. *Epic Systems*, No. 16-285, Pet. App. at 10a-11a. It also determined that such waivers are unenforceable under the FAA's saving clause because "illegality" is a "'ground[ ] * * * for the revocation of any contract.'" *Id.* at 14a-15a (quoting 9 U.S.C. § 2) and *id.* at 20a.

The Seventh Circuit acknowledged that the Fifth Circuit had reached "the opposite conclusion." *Id.* at 15a, but the Seventh Circuit characterized the Fifth Circuit's reasoning as relying on mere dicta in *Concepcion* and *Italian Colors*. *Id.* The Seventh Circuit also recognized that the Second and Eighth Circuits "agree with the Fifth," citing *Sutherland* and *Owen*, but it viewed the analyses in those decisions as insufficient. *Id.* at 19a.

II. THE DECISION BELOW IS INCORRECT AND CONFLICTS WITH THIS COURT'S ARBITRATION PRECEDENTS.

The Ninth Circuit's decision was mistaken on the merits of the important question presented and must be rectified.

The Ninth Circuit majority erred when it began its analysis with an interpretation of the NLRA as conferring substantive rights on employees, and then concluding that those rights override the employee's agreement to arbitrate employment-related disputes. As Judge Ikuta wrote in her detailed dissent, sections 7 and 8 of the NLRA do not "expressly preserve any right for employees to use a specific *procedural* mechanism to litigate or arbitrate disputes collectively." App. 36a (emphasis in original).

The court of appeals should have begun with the FAA's presumption that arbitration agreements are enforceable as written. *See* 9 U.S.C. § 2; *CompuCredit*, 132 S. Ct. at 668-669; *Moses H. Cone*, 460 U.S. at 24-25 and it should have asked whether the NLRA was an explicit congressional command "contrary" to the FAA. *CompuCredit*, 132 S. Ct. at 669. Under this Court's criteria, the NLRA is not a "contrary congressional command" that bars class waivers in arbitration agreements. *CompuCredit*, 132 S. Ct. at 669.

In this case, the Ninth Circuit held that a waiver provision requiring employees to bring legal claims through individual arbitration violates the NLRA and therefore is unenforceable. *Id.* at *1, *5. The Ninth Circuit majority concluded that the FAA's enforcement mandate yields to the NLRA under the "saving clause." *Id.* at *7.

The FAA "establishes 'a liberal federal policy favoring arbitration agreements.'" *CompuCredit*, 132 S. Ct. at 669 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).[7] The FAA is "[t]he background law governing" questions of enforcement of arbitration agreements, even when other federal statutes are allegedly inconsistent with the FAA. *CompuCredit*, 132 S. Ct. at 668. Further, the FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25.

Under the FAA "[a] written provision * * * to settle by arbitration a controversy * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2, and "[t]he burden is on the party opposing arbitration * * * to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights

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[7] The type of arbitration "envisioned by the FAA" is "bilateral" (individual) arbitration, not class arbitration. See *Concepcion*, 563 U.S. at 348, 351.

at issue." *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 227 (1987).

This Court has consistently upheld the FAA's policy favoring enforcement of arbitration agreements as written. See, *e.g.*, *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Italian Colors*, 133 S. Ct. 2304; *CompuCredit*, 132 S. Ct. 665; *Concepcion*, 563 U.S. 333; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Shearson/American Express*, *supra*; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Moses H. Cone*, 460 U.S. 1.

The FAA "requires courts to enforce agreements to arbitrate according to their terms[,] * * * even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *CompuCredit*, 132 S. Ct. at 669 (quoting *Shearson/American Express*, 482 U.S. at 226). The congressional command must indicate Congress's contrary intent with "clarity." *CompuCredit*, 132 S. Ct. at 672. Section 7 of the NLRA grants employees the right "to engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157, but it does not give employees the right to arbitrate or litigate an employment dispute as a class or collective action nor does it expressly prohibit class waivers. As Judge Ikuta forcefully argued in dissent, the

collective-bargaining provisions of the NLRA "neither mention arbitration nor specify the right to take legal action at all, whether individually or collectively," App. 35a, and those provisions do not "expressly preserve any right for employees to use a specific *procedural* mechanism to litigate or arbitrate disputes collectively." App. 36a (emphasis in original).

The court below also erred in its reliance on the FAA's "saving clause" to avoid enforcing the arbitration provision. The FAA's saving clause provides that an arbitration agreement is enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The saving clause permits courts to decline to enforce arbitration agreements based on generally applicable contract defenses provide for revocation of an agreement.

The Ninth Circuit court reasoned that because Ernst & Young's arbitration provision contains a class action waiver that is "illegal" under Section 7 of the NLRA and because "illegality" is a general defense to enforcement of a contract, this case falls within the FAA's saving clause. App. 16a, 24a.[8]

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[8] Judge Ikuta criticized the majority's reliance on the FAA's saving clause for a number of reasons. App. 38a-41a. First, this Court does not apply the saving clause to federal statutes unless the supposedly conflicting statute contains a congressional command contrary to the use of arbitration. App. 39a. Second, the majority incorrectly concluded that collective-action waivers are illegal, but such a waiver

(continued...)

Under the Ninth Circuit majority's reasoning, there is no need to determine whether another federal statute qualifies as a "contrary congressional command" because the saving clause allows courts to decline to enforce an arbitration agreement if there is another that federal law could be interpreted to conflict with the agreement to arbitrate, and there is no need to identify an explicit "contrary congressional command." Such a rule would render nugatory the FAA's presumption of enforceability of arbitration agreements as written. But as this Court in *Concepcion* explained, "when a doctrine normally thought to be generally applicable, such as duress or * * * unconscionability, is * * * applied in a fashion that disfavors arbitration," it falls outside the saving clause. 563 U.S. at 341. Judicial refusal to enforce a waiver of class or collective arbitration is inimical to a core purpose of the FAA because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes

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[8](...continued)
"would be illegal only if it were precluded by a 'contrary congressional command' in the NLRA, and here there is no such command." App. 40a. Further, even if the FAA's saving clause were applicable to federal statutes, it would not save the majority's construction of the NLRA as "giving employees a substantive, nonwaivable right to classwide actions" because such a right would "disproportionately and negatively impact arbitration agreements by requiring procedures that 'interfere[] with fundamental attributes of arbitration.'" *Id.* (quoting *Concepcion*, 563 U.S. at 344).

of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344.

Protracted litigation frustrates Congress's intent in passing the FAA "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible" so as not to "frustrate[] the statutory policy of rapid and unobstructed enforcement of arbitration agreements." *Moses H. Cone*, 460 U.S. at 22-23. The Ninth Circuit's decision would negate numerous agreements to arbitrate, is wrong on the merits and should be reversed.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT AND WARRANTS REVIEW.

All three petitions pending before the Court raising the issue presented in this case – from employers and the NLRB – argue that the circuit split is fully developed, acknowledged, and ripe for resolution by this Court. See Petition at 19, Petition in *Epic Systems v. Lewis*, No. 16-285, at 20, and Petition in *NLRB v. Murphy Oil*, No. 16-307 at 24.

The split among the circuits promises only turmoil, forum shopping and more expensive, time-consuming litigation. The split is unlikely to resolve itself and this Court should intervene now to resolve it.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

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RECORD
AND
BRIEF

No. 16-300

IN THE

Supreme Court of the United States

ERNST & YOUNG, LLP, ET AL.,
Petitioners,

v.

STEPHEN MORRIS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR THE BUSINESS ROUNDTABLE AS AMICUS CURIAE SUPPORTING PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Business Roundtable (BRT) is an association of chief executive officers of leading U.S. companies that together have $6 trillion in annual revenues and nearly 15 million employees. The BRT's member companies comprise nearly one-quarter of the total value of the U.S. stock market and pay $226 billion in dividends to shareholders. The BRT was founded on the belief that businesses should play an active and effective role in the formulation of public policy, and participate in litigation as *amici curiae* where important business interests are at stake.

This case presents the question whether the National Labor Relations Act (NLRA) invalidates employment agreements that require employee-employer disputes to be resolved through individual arbitration, not collective adjudication such as a class action. Many of the BRT's members have integrated similar arbitration provisions as part and parcel of their own employment contracts. A ruling that renders class-action waivers unenforceable, like the Ninth Circuit's determination below, jeopardizes the reliance that many of the BRT's members have placed on having a speedy, efficient, and cost-effective means of resolving disputes with their employees.

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[1] All parties have consented to the filing of this brief. Blanket consents by petitioners and respondents are on file with the Clerk. The BRT provided notice of its intent to file this brief on October 4, 2016. No counsel for a party authored any part of this brief, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

SUMMARY OF ARGUMENT

A. The Ninth Circuit held here, and the Seventh Circuit has held in another case, that bilateral arbitration agreements between employers and employees are rendered unenforceable by the NLRA. Those holdings have caused great uncertainty for employers across the country. Many employers operating on a nationwide scale depend on the knowledge that claims brought by their employees will be resolved speedily, efficiently, and cost-effectively through the arbitration process, no matter what jurisdiction they are in. And other circuits had previously upheld these agreements as enforceable. But the circuit split has jeopardized that uniformity and has incentivized forum-shopping, with the Seventh and Ninth Circuits now serving as attractive venues for class plaintiffs. This case dramatizes the dilemma for nationwide employers: the same agreement, used by petitioners throughout the country, has been upheld in one circuit and struck down in another. Before the split deepens any further, this Court should answer the question of enforceability.

B. This case presents the best vehicle to consider the question presented. A motion to compel arbitration in a civil action between employer and employee narrows the issue to the sole question of enforceability. Because this petition arises out of such a motion, it presents the question of enforceability in a neat and easily resolvable manner that may wholly dispose of the case.

The Deputy Solicitor General, representing the National Labor Relations Board (Board), has asked this Court to take up the same question in a certiorari

petition seeking review of a Fifth Circuit decision that in turn reviewed a Board decision. *See NLRB v. Murphy Oil USA, Inc.*, No. 16-307 (filed Sept. 9, 2016). But decisions in that posture are an inferior vehicle because they do not address a concrete dispute over the enforceability of a particular arbitration provision in a particular litigation. Rather, it turns on whether the *existence* of the agreement (or the mere attempt to enforce it in court) is an unfair labor practice under section 7 of the NLRA, 29 U.S.C. § 157. While the question of enforceability may be wrapped up to that analysis, *Murphy Oil* does not as neatly present it.

This Court should answer the question of enforceability in the context in which it is the most relevant—a civil action between employees and their employer that is subject to a bilateral arbitration provision. This case presents the rare circumstance where courts of appeals have weighed in *on the same arbitration agreement* and have rendered conflicting opinions. It is therefore the best vehicle for resolving the question whether the NLRA affects otherwise valid arbitration agreements that waive waiver of the right to pursue class and collective actions.

ARGUMENT

The Federal Arbitration Act makes agreements to arbitrate enforceable and adopts "a liberal federal policy favoring arbitration agreements." 9 U.S.C. § 2; *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). That rule extends to agreements to arbitrate *individually*, not collectively. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344, 348 (2011). The question presented in this case is whether Congress, in the NLRA, made *employer-employee* agreements that mandate individual arbitration unenforceable—or empow-

ered the Board to do that. That question implicates an important and irreconcilable circuit conflict, and this is the case in which to resolve it.

A. Arbitration provisions and class-or-collective-action waivers play a key role in employment agreements, and employers require certainty as to whether and when such provisions are enforceable.

Employers, including many BRT members, have invested heavily in developing efficient methods of resolving employer-employee disputes. Relying on this Court's decisions that agreements to arbitrate are enforceable, many employers have turned to bilateral arbitration agreements as an optimal solution. But a circuit conflict now threatens to render that investment worthless, especially for nationwide employers: if even a handful of circuits refuse to enforce arbitration agreements because they provide for *bilateral* arbitration, then plaintiffs bringing nationwide class actions against nationwide employers will simply sue in those circuits.

Arbitration is often faster, more efficient, and cheaper than litigation in court: "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." (citations omitted. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010); *see also* Ryan P. Steen, Comment, *Paying for Employment Dispute Resolution: Dilemmas Confronting Arbitration Cost Allocation*

Throw the Arbitration Machine Into Low Gear, 7 J. Small & Emerging Bus. L. 181, 182 (2003) ("The relative economic certainty of arbitration as opposed to litigation makes arbitration an attractive option for employers in a society where employment litigation is dramatically on the rise."). But much of that benefit is lost if the arbitration is not restricted to *bilateral* arbitration. "[T]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *AT&T Mobility*, 563 U.S. at 348. As a result, the use of bilateral arbitration has become widespread among employers. And until this year, the circuits broadly held those agreements enforceable. *Patterson v. Raymours Furniture Co.*, No. 15-2820-CV, 2016 WL 4598542, at *2 (2d Cir. Sept. 2, 2016); *Sutherland v. Ernst & Young*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013); *see also Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1334-36 (11th Cir. 2014) (affirming a grant of a motion to compel arbitration and holding that the Fair Labor Standards Act "does not provide for a non-waivable, substantive right to bring a collective action" that defeats a waiver of collective action).

But now, in two significant circuits, an employer can no longer enforce those bilateral arbitration agreements. *See* Pet. App. 1a; *Lewis v. Epic Systems Corp.*, 823 F.3d 1147, 1153 (7th Cir. 2016). That circuit conflict upsets the settled expectations of every employer doing business in the minority circuits.

This case is illustrative. The *same agreement* has been upheld as enforceable in the Second Circuit. *Sutherland*, 726 F.3d at 295-99. This case was brought in the Second Circuit but transferred to the Ninth Circuit—and as a result of the transfer, the employer can no longer enforce the arbitration agreement as written. Venue made all the difference. Yet nationwide employers count on arbitration provisions to provide predictable, speedy dispute resolution *wherever* disputes arise.

This Court should grant review to provide the certainty employers need. Are these agreements enforceable, or must employers go back to the drawing board? The Court should provide an answer, rather than watch more and more employment litigation gravitate to the circuits on the minority cite of the split. And as discussed below, this case furnishes the best vehicle to answer the question that matters.

B. The circuit conflict concerns whether an arbitration agreement mandating bilateral arbitration is enforceable, and this Court should answer that question in a case involving an attempt to enforce such an agreement.

Bilateral arbitration provisions in employment contracts have been attacked both in court, in disputes that invoke the arbitration agreement, and in proceedings before the Board. Cases like this one—cases that involve the grant or denial of a motion to compel arbitration of a particular dispute under the FAA—are the appropriate vehicles to decide whether an arbitration agreement like this one is excepted from the FAA's rule of enforceability. The Board has brought a number of

proceedings contending that employers violate the NLRA merely by maintaining such an arbitration provision, *or* by seeking to enforce one in court. But the issue on which there is a conflict concerns the interpretation of the FAA, *not* just the NLRA, and Board proceedings involve collateral issues that could impede resolution of the split. This Court should therefore take an FAA case to answer the FAA question.

A motion to compel arbitration in a private action neatly presents a single question: whether an arbitration clause is enforceable as written. In this case, the district court held that it was; the Ninth Circuit panel majority held that it was not. The petition here therefore neatly presents the question whether an agreement like petitioners' is "valid, irrevocable, and enforceable," or whether it is instead rendered unenforceable on some "grounds [that] exist . . . for the revocation of any contract." 9 U.S.C. § 2.

When an arbitration clause containing a class-or-collective-action waiver is contested in an adjudication before the Board, however, the inquiry becomes more muddled and complicated. Unlike a court, the Board does not consider whether the employer *actually invoked* the clause with regard to a particular employee's claims, or whether that clause may be enforced at all. *See Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 209 (5th Cir. 2014) (under Board precedent, "the employer's enforcement of the rule" is not determinative as to whether there has been a section 7 violation—the rule need only "reasonably tend to chill employees in the exercise of their Section 7 rights" (citations and internal quotation marks omitted)). Nor does the Board even care whether the agreement is entered into volun-

tarily. *See On Assignment Staffing Servs., Inc.*, 362 N.L.R.B. No. 189, 2015 WL 5113231, at *9 (Aug. 27, 2015), *enforcement denied mem.*, No. 15-60642, 2016 WL 3685206 (5th Cir. June 6, 2016).

Rather, the Board asks whether the implementation and enforcement of that clause constitutes an unfair labor practice. This means the Board must consider, sometimes in the abstract, whether the clause's inclusion in the employment agreement interferes with an employee's right to engage in concerted activity, whether an attempt to enforce the clause in court is a *separate* violation of the NLRA, and whether holding the employer liable for attempting to enforce the clause in court is in line with the limitations that the First Amendment places on the Board. *See, e.g., Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1020-21 (5th Cir. 2015).

Because of the procedural simplicity of a motion to compel arbitration, it is no surprise that the majority of circuits to have addressed the question presented have done so against the backdrop of a civil action between private parties. The two courts to hold that the NLRA forbids enforcement of an arbitration agreement containing a waiver of class or collective action, the Seventh and Ninth Circuits, have done so in reviewing district court decisions on motions to compel arbitration. *See* Pet. App. 1a; *Lewis*, 823 F.3d at 1153 (review of denied motion to compel arbitration). And most of the courts rightly holding that such agreements are permissible also have done so on review of district court decisions on motions to compel arbitration. *See Patterson*, 2016 WL 4598542, at *2 (grant of a motion to compel arbitration); *Sutherland*, 726 F.3d at 295-99;

Owen v. Bristol Care, Inc., 702 F.3d at 1055; *see also Walthour*, 745 F.3d at 1334-35.

In contrast, when the enforceability issue is raised in the Board's adjudicative proceedings, it is often entangled in a web of other issues. The Deputy Solicitor General's preferred vehicle, the Fifth Circuit's recent decision in *Murphy Oil*, illustrates the problem. There, the court focused most of its attention on a collateral issue—whether the Board erred in finding that the employer's past *attempts to enforce* the agreement by filing motions to compel arbitration were in themselves violations of the NLRA. *See* 808 F.3d at 1020. To answer that question, the Fifth Circuit turned to this Court's decision in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), in which this Court held that a lawsuit against an employee is actionable as an unfair labor practice only when that lawsuit is a "baseless" one, "with the intent of retaliating against an employee for the exercise of rights protected by § 7 of the NLRA." *Id.* at 744. The Fifth Circuit held in *Murphy Oil* that the employer's past attempts to compel arbitration were not "baseless" because there was no evidence of retaliation, because the employer's position was ultimately correct in light of the circuit's caselaw, and because the Board had yet to speak "on the lawfulness of such agreements in light of the [Act]" when the employer had filed its motions to compel arbitration. 808 F.3d at 1021.[2]

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[2] The Eighth Circuit held similarly in *Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772 (2016). Adopting the rationale of *Murphy Oil*, it held that the class-action waiver at issue in that case "did not violate section 8(a)(1)," and thus the employer's at-

The Board has asked this Court to review the decision in *Murphy Oil*. *See* Pet. for a Writ of Cert., *NLRB v. Murphy Oil USA, Inc.*, No. 16-307 (filed Sept. 9, 2016), but its certiorari petition does not address the aspects of the Fifth Circuit's decision that consumed most of the ink—how to balance "an employer's First Amendment right to litigate and an employee's Section 7 right to engage in concerted activity." 808 F.3d at 1020. In addressing the employer's attempted *enforcement* of the agreement, the court was required to address whether the employer's actions in moving to compel arbitration was indeed "baseless," *Bill Johnson's*, 461 U.S. at 745, both objectively and subjectively. *BE & K Const. Co. v. NLRB*, 536 U.S. 516, 531-32 (2002). The Fifth Circuit only briefly addressed whether the agreement itself was enforceable, and then only in the context of the Board's allegation that *maintaining* the agreement was an unfair labor practice, whether or not it was ever enforced.

There are, in short, some differences between the questions whether a bilateral arbitration agreement is *enforceable* and whether it is *an unfair labor practice*. Clarifying that an agreement like petitioners' *is* enforceable should resolve both sets of cases, whereas it is possible that deciding an unfair-labor-practice case might not.

Moreover, agency deference is no reason to favor an adjudication by the Board as a vehicle. The Board deserves *no* deference when it comes to the Federal Arbi-

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tempt to "enforce the class-action waiver likewise did not violate section 8(a)(1)."). *Id.* at 776-77.

tration Act.[3] *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002) ("[W]e have . . . never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA."); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529 n.9 (1984) ("While the Board's interpretation of the NLRA should be given some deference, the proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is novel."); *Richards v. Ernst & Young LLP*, 744 F.3d 1072, 1075 n.3 (9th Cir. 2013) ("[W]e also note that the two court of appeals, and the overwhelming majority of the district courts, to have considered the issue have determined that they should not defer to the NLRB's decision in *D.R. Horton* on the ground that it conflicts with the explicit pronouncements of the Supreme Court concerning the policies undergirding the Federal Arbitration Act."); *see also* Stephanie Greene & Christine Neylon O'Brien, *The NLRB v. the Courts: Showdown Over the Right to Collective Action in Workplace Disputes*, 52 Am. Bus. L.J. 75, 128 (2015) ("Courts that have considered the Board's decision have paid lip service to the requirement that its interpretation of section 7 requires *Chevron* deference. Nevertheless, they have found that the Board's interpretation of the FAA has little import because the Board has no expertise in interpreting the

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[3] The Board has attempted to hint otherwise in at least one other case. *See* Br. for the NLRB at *22 n.5, *Cowabunga, Inc. v. NLRB*, Nos. 16-10932, 16-11391, 2016 WL 4268061 (11th Cir. filed Aug. 8, 2016) (advancing the position that even in "the FAA context," the Board's determination is "within *Chevron*'s scope" (citation omitted)).

FAA or Supreme Court decisions that construe the FAA.").

It is indeed telling that *none* of the courts of appeals to side with the Board's position have adopted or deferred to the Board's rationale in *D.R. Horton*. In the Ninth Circuit's discussion of the interplay between the FAA and the NLRA in this case, for instance, the court of appeals undertook an independent analysis of both statutes and found its ultimate conclusion "consistent with the Board's interpretation," Pet. App. 6a, but did not defer to a decision of the Board. *See id.* at 34a (Ikuta, J., dissenting) ("Although the majority cites [*Chevron*], it does not defer to the NLRB's interpretation of § 7 as overriding the command of the FAA in [the NLRB's decision in *D.R. Horton*], which was subsequently overruled by the Fifth Circuit. Rather, the majority states that 'the NLRA is unambiguous, and there is no need to proceed to the second step of *Chevron*.'"). The Seventh Circuit took a similar tack in *Lewis*. While it alluded briefly to the concept of deference by noting that "[t]he Board's interpretations of ambiguous provisions of the NLRA are 'entitled to judicial deference,'" it held that section 7 was *not ambiguous* and thus no agency deference was necessary. 823 F.3d at 1153.

None of the Board decisions percolating in the federal courts of appeals is likely to present the enforceability question any more neatly than the petition here. They, too, are encumbered by ancillary issues attached to the question of enforceability. For example, *AT&T Mobility Servs., LLC v. NLRB*, which is currently before the Fourth Circuit, presents the additional question whether an arbitration agreement with an opt-out

option still implicates the same purported section 7 concerns. *See* Pet'r Br. at 43-53, *AT&T Mobility Servs., LLC v. NLRB*, Nos. 16-1099 and 16-1159 (4th Cir. filed Apr. 4, 2016). And the D.C. Circuit will soon consider *Price-Simms v. NLRB*, which presents the same question that the Fifth Circuit considered in *Murphy Oil* and the Eighth Circuit addressed briefly in *Cellular Sales*—whether a motion to compel arbitration constitutes a "baseless" litigation under *Bill Johnson's* and *BE&K Construction*. *See* Pet'r Br. at 21-25, *Price-Simms v. NLRB*, Nos. 15-1457, 16-1010 (D.C. Cir. filed Apr. 6, 2016).

* * * * *

This petition neatly presents a single question: whether an agreement to individually arbitrate claims between an employer and an employee is enforceable, or whether the NLRA (which is silent on the question of arbitration) demands a different result. Pet. i. The petition presents that question in the context of a private employer-employee dispute over the enforceability of that agreement. And the petition presents the rare circumstance where two courts of appeals have interpreted the *same* arbitration agreement and have made divergent determinations as to whether that agreement should be enforced. That a conflict exists as to the lawfulness of a *single agreement* makes this case an especially attractive vehicle for addressing the enforceability issue.

CONCLUSION

The petition for a writ of certiorari in this case should be granted, and the other cases (including *NLRB v. Murphy Oil*) presenting the same issue should be held pending consideration of this case on the merits.

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RECORD AND BRIEFS

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Nos. 16-~~307~~ & 16-300

In the Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,

v.

JACOB LEWIS,
Respondent.

ERNST & YOUNG LLP AND ERNST & YOUNG U.S. LLP,
Petitioners,

v.

STEPHEN MORRIS AND KELLY MCDANIEL,
Respondents.

On Petitions for Writs of Certiorari to the United States Courts of Appeals for the Seventh and Ninth Circuits

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. The Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community, including cases involving the enforceability of arbitration agreements. See, *e.g.*, *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2015); *Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011). Because the simplicity, informality, and expedition of arbitration depend on the courts' consistent recognition and application of the principles underlying the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, the Chamber and its members have a strong interest in these cases.[1]

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties in both cases received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. All parties have filed blanket consents to the filing of *amicus curiae* briefs with the Clerk, except respondents in No. 16-300, whose letter of consent has been filed concurrently with this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

These cases—and two other pending petitions[2]—bring before the Court the determination by the National Labor Relations Board that agreements between employers and employees to arbitrate disputes on an individual basis constitute an unfair labor practice because, by precluding class actions, they interfere with "concerted activities" protected by Section 7 of the National Labor Relations Act ("NLRA"). *In re D.R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274, *enf. denied in relevant part sub nom. D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344 (5th Cir. 2013).

The issue has caused an untenable split among the lower courts and is of broad national importance, implicating employment contracts involving millions of employees. It clearly merits this Court's review.

Rather than elaborating on the reasons why review is warranted—which are discussed in detail in the petitions—this brief focuses on the other important question the Court must resolve at the certiorari stage: which petitions the Court should grant.

To answer that question, it is first necessary to identify the multiple issues that the Court will be required to address in order to resolve conclusively whether the National Labor Relations Act overrides the Federal Arbitration Act's mandate that arbitration be enforced. Then, the Court must determine which questions presented encompass all of the relevant issues.

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[2] No. 16-307 (*NLRB* v. *Murphy Oil USA, Inc.*), and No. 16-388 (*Patterson* v. *Raymours Furniture Co.*).

In our view, that important consideration weighs heavily in favor of granting the petitions in these cases (Nos. 16-285 and 16-300), irrespective of whether the Court also grants the government's petition in No. 16-307 (*Murphy Oil*).[3]

The Court will have to undertake three overarching inquiries to resolve definitively the validity of the Board's *D.R. Horton* rule:

- Whether the FAA's "mandate" that arbitration agreements be enforced is "overridden by a contrary congressional command" in the NLRA. *Shearson/Am. Express Inc.* v. *McMahon*, 482 U. S. 220, 226 (1987).
- Whether an arbitration agreement precluding class proceedings is invalid because it "operat[es] as a prospective waiver of a party's right to pursue statutory remedies." *Italian Colors*, 133 S. Ct. at 2310.
- Whether application of the *D.R. Horton* rule is permissible under the "savings clause" of Section 2 of the FAA, which allows arbitration agreements to be denied effect based on generally applicable "grounds * * * at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

The question presented by the government in *Murphy Oil*, however, asks the Court to resolve only

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[3] A fourth petition, in *Patterson* v. *Raymours Furniture Co.*, No. 16-388, also raises the issue discussed here. The petitioner in *Patterson* does not seek plenary review and instead requests that the Board's petition in No. 16-307 (*Murphy Oil*) be granted. See Pet. for Certiorari 9, 29, No. 16-388.

one of these issues—whether the *D.R. Horton* rule falls within the FAA's savings clause. That blinkered focus excludes critical issues that the Court will be required to address and, therefore, would not put before the Court the multiple legal issues it must decide to resolve the conflict definitively.

Therefore, regardless of whether the Court grants the government's petition, we urge the Court to grant the petitions in *Epic Systems* and *Ernst & Young*. Both petitions frame the question presented broadly and capture all of the relevant inquiries.

In recent Terms, the Court has granted multiple petitions in the Fourth Amendment blood alcohol cases (see *Birchfield* v. *North Dakota*, 136 S. Ct. 2160, 2172 (2016)), the Affordable Care Act/Religious Freedom Restoration Act cases (see *Zubik* v. *Burwell*, 136 S. Ct. 1557, 1560 (2016) (per curiam)), and the Fourth Amendment cell phone cases (see *Riley* v. *California*, 134 S. Ct. 2473, 2481-82 (2014)) to ensure a full presentation of the issues. It should cast a broad net here as well.

ARGUMENT

I. THIS COURT MUST ADDRESS THREE DISTINCT ISSUES TO FULLY RESOLVE THE CONFLICT AMONG THE LOWER COURTS.

The issue presented by these petitions is important, frequently recurring, and the subject of a deep and intolerable split among the federal courts of appeals and state courts of last resort. This Court's review is manifestly warranted.

This dispute, at bottom, requires the Court to reconcile two federal statutes, a function that the

Court is often called upon to perform in a variety of contexts. When faced with the task of reconciling other federal laws with the FAA, the Court has distilled its general approach into two well-developed legal tests.

First, the Court asks whether the other federal statute contains a "contrary congressional command" overriding the FAA.

Second, the Court assesses whether an arbitration agreement "operat[es] as a prospective waiver of a party's right to pursue statutory remedies" created by the other federal law.

The Board relies principally on a third ground to justify its *D.R. Horton* rule, arguing that the rule falls within the FAA's "savings clause."

The Court must address each of these issues to resolve conclusively the dispute presented by the pending petitions. These issues in turn raise a number of subsidiary questions. (In the Chamber's view, none of these inquiries justifies the Board's *D.R. Horton* rule.)

A. The Two Statutes.

As the petitions explain, these cases involve the interaction of two federal statutes: the Federal Arbitration Act ("FAA") and the National Labor Relations Act ("NLRA").

The FAA. Enacted in 1925, the FAA was intended to "reverse the longstanding judicial hostility to arbitration agreements," *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002), and substitute "an 'emphatic federal policy in favor of arbitral dispute resolution.'" *KPMG LLP* v. *Cocchi*, 132 S. Ct. 23, 25 (2011) (per curiam) (quoting *Mitsubishi Motors Corp.* v.

Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985)).

The statute mandates the enforceability of arbitration agreements, providing that they are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In the absence of such generally applicable grounds, "courts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted." *Italian Colors*, 133 S. Ct. at 2309 (quotation marks, brackets, and citations omitted).

This Court has held that the FAA prohibits courts from "invalidat[ing] arbitration agreements on the ground that they do not permit class arbitration" or class proceedings in court. *Italian Colors*, 133 S. Ct. at 2308 (internal quotation marks omitted); see also *Imburgia*, 136 S. Ct. at 471 (reiterating that state courts must enforce arbitration agreements containing class waivers); *Concepcion*, 563 U.S. at 340, 352.

The arbitration agreements in the cases currently before the Court all require disputes to be arbitrated on an individual basis, and prohibit class proceedings.

The National Labor Relations Act. Section 7 of the NLRA, which was enacted in 1935, protects the right of covered employees to organize, bargain collectively, and "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Section 8, in turn, makes it unlawful for employers to "interfere

with, restrain, or coerce employees in the exercise of" these rights. *Id.* § 158(a)(1).

In the Board's view, an employee's participation in a class or collective lawsuits is a form of "concerted activit[y]" under Section 7, and agreements to arbitrate disputes on an individual basis infringe upon that right in violation of Section 8.

B. The Legal Issues.

1. Does The NLRA Contain A "Contrary Congressional Command" Overriding The FAA?

Background. When plaintiffs argue that another federal statute provides grounds for invalidating an arbitration agreement, this Court has asked whether the other federal statute contains a "contrary congressional command' overriding the FAA's mandate that arbitration agreements be enforced. *CompuCredit Corp.* v. *Greenwood*, 132 S. Ct. 665, 669 (2012). This Court has been loath to find that test satisfied, holding that if a statute is "silent on whether claims * * * can proceed in an arbitrable forum, the FAA requires [an] arbitration agreement to be enforced according to its terms." *Id.* at 673.

The Court outlined the "contrary congressional command" test almost thirty years ago in *McMahon*, 482 U.S. at 226. "[I]n every case considering a party's claim that a federal statute precludes enforcement of an arbitration agreement," this Court "begins by considering whether the statute contains an express 'contrary congressional command' that overrides the FAA." Pet. App. 29a, No. 16-300 (Ikuta, J., dissenting); see *CompuCredit*, 132 S. Ct. at 669; *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Rodriguez de Quijas* v. *Shearson/Am. Ex-*

press, Inc., 490 U.S. 477 (1989); *Mitsubishi Motors*, 473 U.S. at 640.

Under this test, "[t]he burden is on the party opposing arbitration * * * to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *McMahon*, 482 U.S. at 227.

The Court has explained, moreover, that when Congress wants to override the FAA in a particular context, it does so with "clarity" by mentioning arbitration expressly in the text of the statute. *CompuCredit*, 132 S. Ct. at 672 (citing 7 U.S.C. § 26(n)(2); 12 U.S.C. § 5518(b); and 15 U.S.C. § 1226(a)(2)).

The "contrary congressional command" standard is a demanding one. Indeed, each time this Court has applied the test, it has concluded that the federal statute at issue did not evince the requisite "contrary congressional command." See *CompuCredit*, 132 S. Ct. at 673 (Credit Repair Organizations Act); *Gilmer*, 500 U.S. at 35 (Age Discrimination in Employment Act of 1967); *Rodriguez de Quijas*, 490 U.S. at 484 (Securities Act of 1933); *McMahon*, 482 U.S. at 238, 242 (Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act); *Mitsubishi Motors*, 473 U.S. at 640 (Sherman Act).

To prevail under this framework, the respondents in *Epic* and *Ernst & Young*, and the Board in *Murphy Oil*, would have to establish that the NLRA contains clearer language precluding individual arbitration than the statutes found insufficient in the preceding cases. That is a tall order.

Analysis. The text of the NLRA does not mention arbitration. That fact alone is dispositive of the issue.

As this Court explained in *CompuCredit*, when a statute is "silent on whether claims * * * can proceed in an arbitrable forum, the FAA requires [an] arbitration agreement to be enforced according to its terms." 132 S. Ct. at 673. See also *D.R. Horton* v. *NLRB*, 737 F.3d 344, 361 (5th Cir. 2013) (noting that Congress "did not discuss the right to file class or consolidated claims against employers" in the NLRA); *Iskanian* v. *CLS Transp. L.A., LLC*, 327 P.3d 129, 141 (Cal. 2014) (Liu, J.) ("[N]either the NLRA's text nor its legislative history contains a congressional command prohibiting [class] waivers.").

The Board, in its *Murphy Oil* decision, asserted that Section 7 of the NLRA overrides the FAA by providing a right to engage in "concerted activities." Pet. App. 45a-46a, No. 16-307 . But that general phrase does not clearly refer to litigation, let alone negate the FAA's protection of individual arbitration. And as the dissents from the NLRB's *Murphy Oil* decision explain, there are compelling arguments that the NLRA unambiguously precludes the *D.R. Horton* rule. Pet. App. 89a-208a, No. 16-307 . At a minimum, the statutory text is ambiguous regarding the permissibility of the rule.

Even if Section 7 could be read, on balance, to protect access to class- or collective-action mechanisms, that would not be sufficient to override the FAA. The Credit Repair Organizations Act ("CROA") expressly allows plaintiffs to bring actions in court, expressly specifies standards governing class actions, and prohibits the waiver of "any right * * * under this sub-chapter," but this Court held in

CompuCredit that these provisions failed to "do the heavy lifting" necessary to displace the FAA. 132 S. Ct. at 670.

The ADEA goes even further, expressly providing for collective actions (29 U.S.C. § 626(b))—yet the Court held that this was likewise insufficient to override the FAA. *Gilmer*, 500 U.S. at 32; see also *Italian Colors*, 133 S. Ct. at 2311 ("In *Gilmer*, we had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the Age Discrimination in Employment Act, expressly permitted collective actions."). If the CROA and the ADEA did not provide the necessary "contrary congressional command," Section 7's far vaguer reference to "concerted activit[y]" surely does not permit a different result.

2. Does Enforcing The Arbitration Agreement Waive A Right To Pursue Statutory Remedies Under The NLRA?

Parties seeking to invalidate arbitration agreements have also argued that—even in the absence of a clear congressional command overriding the FAA—the arbitration agreement should be invalidated because it would as a practical matter prevent a party from pursuing a remedy conferred by federal law.

This Court has held that an arbitration agreement is not protected by the FAA when it "operat[es] as a prospective waiver of a party's right to pursue statutory remedies." *Italian Colors*, 133 S. Ct. at 2310. That exception "finds its origin in the desire to prevent 'prospective waiver of a party's *right to pursue* statutory remedies.'" *Ibid.*; see also *Gilmer*, 500 U.S. at 28 ("[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of

action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.").

a. *Does the right-to-pursue-statutory-remedies principle apply here?*

Background. The Court's precedents address this principle only in the context of arguments that arbitration as a practical matter prevents a claimant from invoking a cause of action conferred by a federal statute. Thus, this principle would bar enforcement of "a provision in an arbitration agreement forbidding the assertion of certain statutory rights" and might also "cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." *Italian Colors*, 133 S. Ct. at 2310-11.

Absent such restrictions, the right-to-pursue-statutory-remedies principle does not apply. For example, the parties' agreement to arbitrate in *CompuCredit* was enforceable because it preserved "*the legal power to impose liability*" under the CROA. 132 S. Ct. at 671 (emphasis in original). Similarly, in *Mitsubishi Motors*, this Court held that agreements to arbitrate antitrust claims were enforceable because a plaintiff could still "vindicate *its statutory cause of action* in the arbitral forum, [and] the statute [would] continue to serve both its remedial and deterrent function." 473 U.S. at 637 (emphasis added).

Analysis. Here, there is no claim that employees are unable to vindicate in arbitration a cause of action conferred by a federal statute. Rather, the argument is that Section 7 confers a right to engage in concerted litigation, and therefore overrides the

FAA's right to enforce contracts that preclude class actions.

But that assertion appears to collapse into the argument that the NLRA evinces a "contrary congressional command"—which is how the Court analyzes contentions Congress has displaced the FAA by authorizing procedures inconsistent with arbitration, such as by expressly providing for the filing of actions in court and vindication of a statutory right through class actions. See pages 7-8, *supra*. Applying the right-to-pursue-statutory-remedies principle in this different context would circumvent that legal standard.[4]

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[4] The Board insists that the right to participate in class and collective actions that it has read into Section 7 of the NLRA is "substantive," and references to class actions in other statutes are "procedural." But there is no principled basis for distinguishing Congress's express authorization of class actions in CROA and the ADEA from the Board's claimed authorization of class proceedings in Section 7—all confer legal authority to engage in class actions. In addition, regardless of the label affixed by the Board, the fact remains that a class action is a procedural device for pursuing a remedy. It is not the remedy itself. As this Court put it some 35 years ago, "the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank, Jackson, Miss.* v. *Roper*, 445 U.S. 326, 332 (1980) (emphasis added); see also, *e.g.*, *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 612-13 (1997) (noting that Rule 23 does not "'abridge, enlarge or modify any substantive right'") (quoting 28 U.S.C. § 2072(b)).

b. *Does enforcing the arbitration agreement waive an employee's right to pursue statutory remedies under the NLRA?*

Even if the "effective remedy" cases could somehow be expanded to encompass claims of a statutory "right" to procedures—when the claimed "right" is too vague to displace the FAA under the contrary congressional command test—they could not save the *D.R. Horton* rule.

The threshold question under this analysis would be whether Section 7 of the NLRA creates a right to engage in class actions. Section 7 states that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," and "to refrain from any or all of such activities." 29 U.S.C. § 157.

The Board maintains that this right to engage in "concerted activit[y]" includes "the right to engage in the collective pursuit of work-related legal claims" in litigation, including through class actions. Pet. for Certiorari 10, No. 16-307 (citing *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565-66 (1978), and *Brady* v. *Nat'l Football League*, 644 F.3d 661, 673 (8th Cir. 2011)).

But Section 7 does not mention litigation—and, "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Wash. State Dep't of Social & Health Servs.*

v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (internal quotation marks omitted). The reference to "other concerted activities" in Section 7 therefore should be read to encompass activities similar to the three enumerated activities of self-organizing, participating in labor unions, and collective bargaining—not bringing class action lawsuits.[5]

If Section 7's protection could extend to concerted litigation activity, a class action is not "concerted" activity at all: "an opt-out class action may be initiated and litigated by an individual employee from start to finish without *any action* whatsoever by other employees." Pet. App. 148a, No. 16-307 (Member Johnson, dissenting). While a class action may affect the rights of absent class members, that alone has never been held sufficient to make an action "concerted" for Section 7 purposes. See *id.* at 148a-154a (examining cases and noting complete lack of support for Board's position that a class action is "concerted" activity).

Indeed, Section 7's reference to concerted activities cannot have been intended to confer a right to

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[5] The *Eastex* case cited by the Board involved the distribution of newsletters, not litigation. This Court stated only that "*it has been held that* the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums"—citing lower court rulings in support of that proposition. 437 U.S. at 565-66 & n.15 (emphasis added). Moreover, the Court took the unusual step of expressly disclaiming any determination as to whether Section 7 encompasses litigation—by following its citation of those lower court decisions with the statement that "we do not address here the question of what may constitute 'concerted' activities in this context." *Id.* at 566 n.15. *Eastex* therefore provides no support whatever for the contention that litigation-related activities are protected under Section 7.

engage in class actions, because the NLRA was enacted "prior to the advent in 1966 of modern class action practice." *D.R. Horton*, 737 F.3d at 362 (emphasis added); see also *Iskanian*, 327 P.3d at 141. Simply put, Congress could not have intended to protect "a right of access to" "procedure[s] that did not exist when the NLRA was (re)enacted." *D.R. Horton*, 737 F.3d at 362.

This Court employed precisely this reasoning in *Italian Colors*. There, the Court held that the antitrust laws did not preclude arbitration provisions containing class-action waivers, in part because the Sherman and Clayton Acts "make no mention of class actions. In fact, they were enacted decades before the advent of Federal Rule of Civil Procedure 23." 133 S. Ct. at 2309. So too here, because the NLRA long predated the advent of class actions, it cannot be read to protect a right to participate in class actions.

The Board argues, of course, that its ruling is entitled to deference. Pet. for Certiorari 12, No. 16-307. But because the NLRA unambiguously does not create a right to file class actions, no deference is warranted. See *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). And even if Section 7 were ambiguous, the question whether the *D.R. Horton* rule provides grounds for invalidating arbitration agreements is governed by the FAA—a statute for which the Board's interpretations are not entitled to deference. Thus, the Court must read the statute for itself, without any deference to the Board's position, and the best reading is that Section 7 does not guarantee a right to class actions.

c. *Even if Section 7 creates a right to participate in class actions, does arbitration prevent effective vindication of Section 7 rights?*

Even if Section 7 could be read to create a right to participate in class actions, the Board would still have to show that arbitration on an individual basis prevents the effective vindication of that right. There are powerful arguments that it does not.

Employees who sign agreements to arbitrate on an individual basis can still engage in myriad forms of concerted activity, including striking, collective bargaining, and organizing. And even within the realm of litigation, employees are left free to communicate with co-workers about workplace problems, to exhort their co-workers to bring claims, to testify in each other's cases, to jointly retain the same counsel, to share evidence, and to pool resources to fund litigation. The *only* thing restricted by agreements to arbitrate on an individual basis is employees' ability to bring class actions.

Indeed, the Justices who dissented in *Italian Colors*—concluding that the arbitration agreement there violated the effective vindication principle by precluding collective action—expressly recognized that "the agreement could have prohibited class arbitration without offending the effective-vindication rule if it had provided an alternative mechanism" for coordination among claimants. 133 S. Ct. at 2318 (Kagan, J., dissenting).

Moreover, the Board's position that the "right" to participate in class actions cannot be waived fails to acknowledge that just as the NLRA protects concerted activity, it also protects the right of employees to

"refrain from" concerted activity. 29 U.S.C. § 157. And in Section 9(a), it guarantees "any individual employee * * * the right at any time to present grievances to their employer and to have such grievances adjusted." *Id.* § 159(a). Thus, as a dissenting Board member has explained, "[t]aken together, Section 9(a) and Section 7 compel a conclusion that Congress intended for employees and employers—and not the NLRB—to choose for themselves *whether* to pursue non-NLRA disputes on a 'collective' versus 'individual' basis." Pet. App. 124a, No. 16-307 (Member Miscimarra, dissenting).

The right-to-pursue-statutory-remedies argument thus fails for three separate reasons: that principle is not applicable when, as here, there is no showing that arbitration will prevent the plaintiff from litigating a federal cause of action; Section 7 does not create a right to bring class actions; and, even if it does, enforcement of the arbitration agreement does not prevent vindication of that "right."

3. Is The D.R. Horton *Rule A Basis "At Law Or In Equity For The Revocation Of Any Contract"?*

Background. The FAA's "savings clause" provides that an arbitration agreement may be held unenforceable "upon such grounds as exist at law or equity for the revocation of any contract." 9 U.S.C. § 2. Parties seeking to invalidate arbitration agreements have invoked this clause to argue that various state law contract principles are protected against preemption by the savings clause.

In rejecting many such contentions, this Court has held that the exception created by the savings clause is narrow. It allows "agreements to arbitrate

to be invalidated by 'generally applicable contract defenses, such as fraud duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339 (quoting *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996)); see *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987) (state law applies only "if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally").

Based on that precedent, this Court has held that the FAA prohibits courts from "invalidat[ing] arbitration agreements on the ground that they do not permit class arbitration" or class proceedings in court. *Italian Colors*, 133 S. Ct. at 2308 (internal quotation marks omitted).

The NLRB, in its petition for certiorari in No. 16-307, nonetheless relies principally on the savings clause as the ground on which the *D.R. Horton* rule can be sustained. Indeed, the NLRB's question presented focuses exclusively on this line of argument. (The Seventh and Ninth Circuits also relied principally on the savings clause in upholding the *D.R. Horton* rule.)

Analysis. The NLRB's reliance on the savings clause is curious, because *none* of this Court's previous decisions addressing the interplay between the FAA and another federal statute has even mentioned the savings clause.

The contention that the *D.R. Horton* rule falls within the savings clause rests on the following syllogism: Under the savings clause, arbitration agreements can be invalidated based on "such grounds as

exist at law or in equity for the revocation of any contract"; illegality is a generally applicable ground for invalidating contracts; the NLRA (according to the Board in *D.R. Horton*) makes agreements to arbitrate disputes on an individual basis illegal, because such agreements infringe upon employees' Section 7 right to engage in "concerted activity"; thus, the NLRA's prohibition is covered by the savings clause. See Pet. App. 14a-15a; Pet. App. 17a, No. 16-300; Pet. for Certiorari 13-14, No. 16-307.

But that is the precise syllogism that the respondents in *Concepcion* invoked in defense of California's *Discover Bank* rule. Like the *D.R. Horton* rule, the *Discover Bank* rule "conditioned the enforcement of arbitration on the availability of class procedure," either in court or in arbitration. See *Italian Colors*, 133 S. Ct. at 2312. The California Supreme Court announced in *Discover Bank* that a class waiver—whether in an arbitration agreement or otherwise—is an unenforceable exculpatory clause when it "is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." *Discover Bank* v. *Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005).

The respondents in *Concepcion* argued that "[t]he savings clause expressly preserves state-law contract principles that do not discriminate against arbitration"; that "'the principle that class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory is a principle of California

law that does not specifically apply to arbitration agreements, but to contracts generally'"; and that "[t]he approach courts have taken to class-action bans in nonarbitration agreements * * * demonstrates that the California Supreme Court and other courts that have reached the same conclusion are concerned with aggregation, not arbitration." Br. for Resp'ts at 13, 21, *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011) (No. 09-893), 2010 WL 4411292, at *13, *21 (quoting *Discover Bank*, 113 P.3d at 1112).

This Court flatly rejected that syllogism. It explained that "[a]lthough § 2's savings clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 563 U.S. at 343. Observing that "[t]he overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings," the Court held that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344.

The same is true of the NLRB's rule conditioning enforcement of employment arbitration agreements on the availability of class procedures. *Concepcion* therefore compels the conclusion that the *D.R. Horton* rule falls outside the savings clause.

The Board and the Seventh and Ninth Circuits attempt to distinguish *Concepcion* on various grounds, none of which withstands scrutiny. First, they argue that Section 7's protection of concerted

activity does not "discriminate" against arbitration. That argument was made and rejected in *Concepcion*: the respondents asserted that "[t]he state does not treat arbitration agreements in a manner different from that in which it otherwise construes nonarbitration agreements" and that "California's unconscionability doctrine incorporates the venerable prohibition on exculpatory clauses," which is "applicable to all contracts and codified in California's law since 1872." Br. for Resp'ts at 18, 19, *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011) (No. 09-893), 2010 WL 4411292, at *18, *19 (internal quotation marks omitted).

This Court held that facial neutrality is insufficient, explaining that if a generally applicable contract defense is "applied in a fashion that disfavors arbitration" or otherwise "stand[s] as an obstacle to the accomplishment of the FAA's objectives," it falls outside the savings clause. *Concepcion*, 563 U.S. at 341, 343. Thus, as the California Supreme Court observed in holding that the *D.R. Horton* rule cannot be reconciled with the FAA, "*Concepcion* makes clear that even if a rule against class waivers applies equally to arbitration and nonarbitration agreements, it nonetheless interferes with fundamental attributes of arbitration and, for that reason, disfavors arbitration in practice." *Iskanian*, 327 P.3d at 141.

Second, the Board and the Seventh and Ninth Circuits argue that the *D.R. Horton* rule does not run aground on *Concepcion* because it leaves employers free to insist on bilateral arbitration so long as class procedures are available to employees in court. But the *Concepcion* respondents, too, pointed out that "California law is neutral as to whether classwide

proceedings take place in arbitration or in court." Br. for Resp'ts at 54, *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011) (No. 09-893), 2010 WL 4411292, at *54.

This Court held, however, that such a hybrid approach was precluded by the FAA because it would undermine the objectives of arbitration. Although consumers would remain free to bring and resolve their disputes on a bilateral basis, there would be "little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process"—"faced with inevitable class arbitration, companies would have less incentive to continue resolving potentially duplicative claims on an individual basis." *Concepcion*, 563 U.S. at 347.

Finally, the Board and the Seventh and Ninth Circuits have argued that *Concepcion* is distinguishable because it involved a state-law rule, whereas here a federal statute must be reconciled with the FAA. But the savings clause draws no distinction based on *the source* of the supposedly neutral contract-law defense. Moreover, while this Court did hold in *Concepcion* that "nothing in [Section 2's savings clause] suggests an intent to preserve *state-law* rules that stand as an obstacle to the accomplishment of the FAA's objectives" (563 U.S. at 343 (emphasis added)), it made clear in *Italian Colors* that the same principle applies to federal-law rules. 133 S. Ct. at 2312 (quoting *Concepcion*, 563 U.S. at 344).

Most importantly, if the Board were correct that the savings clause covers the *D.R. Horton* rule, a state statute purporting to guarantee individuals the right to "concerted action" would also fall within the savings clause. Yet that is exactly what California

courts already attempted to do in *Discover Bank*—and what *Concepcion* held the FAA forbids. Accordingly, "in light of *Concepcion*," such a reading of the NLRA "is not covered by the FAA's savings clause." *Iskanian*, 327 P.3d at 141.

That the *D.R. Horton* rule is the creation of a federal agency *is* relevant, but not to the savings clause. Rather, it brings into play the question whether, in enacting the NLRA, Congress authorized the Board to override the FAA. As we have explained (see pages 7-10, *supra*), there is no credible argument that Congress did so.

II. GRANTING THE PETITIONS IN THESE TWO CASES IS ESSENTIAL TO PUT BEFORE THE COURT THE FULL RANGE OF RELEVANT ISSUES.

As explained above, the Court will have to undertake three overarching inquiries to resolve definitively the validity of the Board's *D.R. Horton* rule—analyzing the "contrary congressional command" issue; the right-to-pursue-statutory-remedies issue (and its several sub-issues); and the savings clause issue.

The question presented by the government in *Murphy Oil*, however, asks the Court to resolve only the savings clause issue. Granting only that petition would not put before the Court all of the issues that must be resolved in order to determine definitively whether the *D.R. Horton* rule is valid.

For that reason, the Court should grant the petitions in these two cases, regardless of whether it also grants the government's petition. Both of these petitions frame the question presented broadly, and therefore clearly capture all of these threads.

The Court frequently grants multiple petitions when necessary to ensure a full presentation of all relevant legal issues. See *Birchfield* v. *North Dakota*, 136 S. Ct. 2160, 2172 (2016); *Zubik* v. *Burwell*, 136 S. Ct. 1557, 1560 (2016) (per curiam); *Riley* v. *California*, 134 S. Ct. 2473, 2481-82 (2014). It should follow that same approach here.

CONCLUSION

The petitions for writs of certiorari in these two cases should be granted.

Respectfully submitted.

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Supreme Court of the United States

ERNST & YOUNG LLP, ET AL.,

Petitioners,

v.

STEPHEN MORRIS, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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STATEMENT OF INTEREST

The Employers Group, a California non-profit organization, is one of the nation's oldest and largest human-resources management organization for employers. It represents nearly 3,500 California employers of all sizes and every industry, which collectively employ nearly 3 million employees. The Employers Group also provides live helpline assistance, online resources and tools, and in-company human-resources consulting services and support to its members. As part of its mission, the Employers Group seeks to enhance the stability, predictability, and fairness of the laws and decisions regulating employment relationships. The Employers Groups thus has a direct interest in the correct interpretation and application of both the National Labor Relations Act (NLRA) and the Federal Arbitration Act (FAA).[1]

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[1] No party or counsel for a party authored or contributed monetarily to the preparation or submission of any portion of this brief. Counsel of record for all parties received notice of the Employers Group's intention to file this brief more than 10 days before it was due, and all parties have consented to its filing.

SUMMARY OF ARGUMENT

As petitioners have explained, this case squarely presents an acknowledged circuit split on an important and frequently recurring issue of federal law. That alone is reason enough to grant the petition. Beyond that, however, review is also urgently needed because the decision below is part of an intensifying trend of precisely the type of "judicial hostility to arbitration" that the FAA was enacted to combat. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 668 (2012). In recent years, this trend has manifested itself in lower courts devising ever more creative ways of distorting or outright defying this Court's precedents in order to impede the enforcement of arbitration agreements "according to their terms." *Id.* at 669. Here, the Ninth Circuit continued that disturbing trend by following a decision of the Seventh Circuit that serially violates this Court's precedents and creates a circuit split on at least three important issues of federal law.

First, the decision ignored this Court's holding that the FAA protects the right of individual arbitration, and that refusing to enforce an agreement to arbitrate on an individual basis is therefore "inconsistent with the FAA." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

Second, the decision distorted this Court's precedent by diluting the level of clarity required for a later statute such as the NLRA to displace an earlier statute such as the FAA.

Third, the decision violated this Court's teaching that an agency interpretation is not entitled to

Chevron deference if it would bring one federal statute into conflict with another.

On all three of these issues, the Ninth Circuit broke from precedent in order to evade the venerable canon against implied repeals, which prohibits interpreting a statute such as the NLRA to displace an older statute such as the FAA absent clear congressional intent. Resolving these issues is thus crucially important not only to the specific issue of arbitration as it affects the nation's employers, but also to the integrity and predictability of the law more broadly.

As between this and the other petitions currently pending on the same issue, this case is the better vehicle: It arises from California, which is ground zero for judicial hostility to arbitration; it contains a thorough dissenting opinion, which minimizes the risk of vehicle problems; and it embodies a perfectly square split with the Second Circuit, which upheld precisely the same arbitration agreement that the Ninth Circuit invalidated here.

ARGUMENT

I. Interpreting the NLRA to Displace the FAA's Protection of Individual Arbitration Conflicts With the Decisions of This Court and Other Circuits

The NLRA was enacted in 1935, and for the next 80 years "no court decision" ever "held that the Section 7 right to engage in 'concerted activities' . . . prohibited class action waivers in arbitration agreements." *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344, 356 (5th Cir. 2013). To the contrary, the NLRA was enacted against the backdrop of the FAA, which

affirmatively *protects* the right of individual arbitration, such that refusing to enforce an agreement to arbitrate on an individual basis is "inconsistent with the FAA." *Concepcion*, 563 U.S. at 344. The year after *Concepcion* was decided, however, the National Labor Relations Board moved to undermine that decision by announcing a novel reinterpretation of the NLRA, which carried sweeping implications for every employer in the country: It proclaimed that, "notwithstanding the [FAA]," agreements to arbitrate on an individual basis (and waiving the right to proceed on a class or collective basis) are now prohibited in any employment contract involving interstate commerce. *In Re D. R. Horton, Inc.*, 357 N.L.R.B. 2277, 2277 (2012). In other words, despite the fact that individual arbitration agreements have long been a common feature of the American employment landscape, the Board suddenly declared that such agreements have been illegal for eight decades—without anybody ever noticing before.

Three circuits promptly rejected the Board's novel interpretation, but the Seventh and Ninth Circuits have now embraced it. *See* Pet. 11–14. In doing so, they have displayed an abject disregard for the venerable canon against the "implied repeal of statutes," which serves the dual values of "stability and predictability" in the law. *Hammon v. Barry*, 826 F.2d 73, 80 (D.C. Cir. 1987). Under this canon, a federal statute such as the NLRA cannot be construed to displace any part of an "earlier" statute such as the FAA unless it contains a "clearly expressed congressional intention" to effectuate the repeal. *Morton v. Mancari*, 417 U.S. 535, 550–51

(1974). This is a "relatively stringent standard," which is "rar[ely]" satisfied. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381 (1996). Indeed, the canon has even greater force here, in the context of the arbitration-specific provisions of the FAA, because such "specific" provisions cannot readily be "controlled or nullified" by a more "general" statute such as the NLRA, which refers generally to "concerted activities" among a wide range of other subjects, but which says nothing about arbitration. *Morton*, 471 U.S. at 550–51.

Rather than following the canon against implied repeals, however, the Seventh and Ninth Circuits chose to evade it. In the process, they made three glaring errors that conflict with the decisions of this Court and other circuits: First, they denied that prohibiting individual arbitration agreements under the NLRA creates any conflict with the FAA. Second, they claimed that the NLRA's general reference to "concerted activities" contains the type of "clear" statement necessary to prohibit individual arbitration agreements. And third, they concluded that the Board's interpretation of the NLRA is entitled to controlling deference. This Court's intervention is urgently needed on all three issues.

A. Interpreting the NLRA to Prohibit Individual Arbitration Agreements Would Repeal the FAA's Protection of Individual Arbitration

In *Concepcion*, this Court squarely held that refusing to enforce an individual arbitration agreement—*i.e.*, an agreement to arbitrate on an individual basis instead of a class or collective basis—

is "inconsistent with the FAA." 563 U.S. at 344. Where the parties have agreed to arbitrate on an individual basis, the imposition of collective proceedings "interferes with fundamental attributes of arbitration." *Id.* At the same time, the Court specifically held that the FAA's savings clause does not alter this conclusion: Because the FAA's affirmative provisions *presuppose* the availability of individual arbitration, it would be "absolutely inconsistent" to read the savings clause to authorize a *ban* on individual arbitration. *Id.* at 343. In other words, the savings clause "cannot in reason be construed" to allow the imposition of class proceedings in contravention of a class waiver, because that would violate the basic principle that "the [statute] cannot be held to destroy itself." *Id.* (citation omitted).

As *Concepcion* explained, the entire "point" of the FAA is "to allow for efficient, streamlined procedures," which "reduc[e] the cost and increas[e] the speed of dispute resolution." *Id.* at 344–45. Such "streamlined procedures" are possible in individual arbitration, but "imposing *class* procedures" would "sacrifice[] the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 344, 347–48 (emphasis added). Moreover, the lack of appellate review in arbitration makes it "poorly suited to the high[] stakes of class litigation," where "damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once." *Id.* at 350. Without appellate review of a collective damages award, "the risk of an error" becomes "unacceptable," which

effectively precludes arbitration as a viable option: few if any defendants will choose to "bet the company with no effective means of review." *Id.* at 350–51. In short, giving defendants the choice of arbitrating only on a *class* basis is really no choice at all, and banning individual arbitration agreements effectively bans arbitration altogether.

For these reasons, the FAA creates a "substantive right" to enforce agreements to arbitrate on an individual basis, and "invalidating private arbitration agreements denying class adjudication, would be an abridgment . . . of [that] substantive right." *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309–10 (2013) (alteration omitted). Consequently, there is a clear and direct conflict between the FAA and any rule prohibiting agreements to arbitrate on an individual basis. Indeed, in *Concepcion*, that conflict was sufficiently clear for the FAA to preempt the law of a *sovereign state*, which occurs only if there is a "clear and manifest" conflict between state and federal law. *See Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992). Accordingly, there can be no doubt that interpreting the NLRA to prohibit individual arbitration agreements would equally create a "square and manifest" conflict with the FAA.

The Seventh and Ninth Circuits flatly defied *Concepcion*: The Ninth Circuit held that the Board's interpretation of the NLRA as prohibiting individual arbitration agreements creates "no inherent conflict [with] the FAA," Pet. App. 18a n.13, and the Seventh Circuit likewise found "no conflict." *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1157 (7th Cir. 2016). But neither court explained how this "no conflict" theory makes any sense given *Concepcion*'s holding that

banning individual arbitration agreements is "inconsistent with the FAA." 563 U.S. at 344. No explanation is possible, other than outright defiance of *Concepcion*.

In defying *Concepcion*, the Seventh and Ninth Circuits also created a conflict with three other circuits, all of which have recognized that the FAA protects the right to enforce individual arbitration agreements, and that the NLRA cannot override this right unless it contains a "contrary congressional command." *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052 (8th Cir. 2013); *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 775–76 (8th Cir. 2016); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 295 (2d Cir. 2013) (per curiam); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 359–60 (5th Cir. 2013) (expressly recognizing that *Concepcion* "leads to the conclusion that the Board's rule" conflicts with the FAA, and "does not fit" within the FAA's saving clause). As a result, the decision below implicates a square circuit split over whether interpreting the NLRA to prohibit individual arbitration agreements conflicts with the FAA.

B. The NLRA Does Not Contain the Requisite Clear Indication to Repeal the FAA's Protection of Individual Arbitration

The decision below also implicates a square split over whether the NLRA contains the type of "clear" indication necessary to overturn the FAA's protection of the right to individual arbitration. The answer to that question is no, and by holding otherwise, the

Ninth Circuit contradicted multiple decisions of this Court and other circuits.

Of course, "[l]ike any statutory directive," the FAA "may be overridden by a contrary congressional command." *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987). But in order for the FAA's protection of individual arbitration to be repealed, "the intention of the legislature . . . must be clear and manifest." *Posadas v. Nat'l City Bank of New York*, 296 U.S. 497, 503 (1936). As this Court has repeatedly emphasized, this is a "stringent standard" that is "rar[ely]" satisfied. *Matsushita*, 516 U.S. at 381 (1996). There is no mistaking the level of clarity that this Court has required: the conflict must be "clear and manifest," *Watt v. Alaska*, 451 U.S. 259, 267 (1981), "clearly expressed," *Morton*, 417 U.S. at 551, and "irreconcilable," *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) ("irreconcilable"); *see also United States v. Borden Co.*, 308 U.S. 188, 198 (1939) ("clear and manifest"). Under this stringent standard, this Court "will not infer a statutory repeal unless the later statute expressly contradicts the original act or unless such a construction is absolutely necessary in order that the words of the later statute shall have any meaning at all." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007) (alterations omitted).

Importantly, the canon against implied repeal is sensitive to the order of statutory enactments, as one of its purposes is to avoid displacing "earlier" statutes, thereby lending stability to the law and protecting reliance interests. *Morton*, 417 U.S. at 550. The canon also recognizes that it is even more difficult for "specific" statutory provisions to be

"controlled or nullified" by the later enactment of more "general" provisions. *Id.* at 550–51.

In the specific context of the FAA, this Court has consistently applied the rule that subsequent statutes must speak with "clarity" in order to displace the FAA's requirement that arbitration agreements be enforced "according to [their] terms." *CompuCredit*, 132 S. Ct. at 672–73. Unless a statute contains a "contrary congressional command" that overrides the FAA, the statute must be read to comport with the FAA. *Italian Colors*, 133 S. Ct. at 2309. Thus, for example, this Court "had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue . . . expressly permitted collective actions." *Id.* at 2311 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)). Although the statute at issue in *Gilmer* (the ADEA) expressly conferred a right to collective action, it gave no indication that this was a *non-waivable* right, and thus it was not sufficiently clear to override the FAA's policy that individuals must be left free to enter agreements to arbitrate on an individual basis.

These principles are dispositive here. The NLRA easily can be read to coexist with individual arbitration agreements, and indeed that is the way everyone always *did* read the statute from its enactment in 1935 until the Board decided *D.R. Horton* in 2012.

At the outset, the NLRA does not mention the procedural mechanism of class litigation, and the term "concerted activities" can be read in any number of ways that have nothing to do with class actions.

The term most naturally refers to activities directly related to unionization and collective bargaining, which are the NLRA's clear focus. And an employee's agreement to arbitrate individually does not remotely "impede" employees' efforts to unionize, "to bargain collectively," or to engage in like activities, which is what the NLRA protects. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 334 (1944). The Board's contrary reading would dramatically expand the reach of the NLRA to encompass the procedural right of class litigation without any connection to bargaining activity, contrary to the way the statute has been understood for eight decades.

Moreover, even assuming the NLRA could be reinterpreted to create a novel "right" to class-action proceedings, the statute contains no clear indication that this hypothetical right would be non-waivable. Indeed, even if the right were non-waivable *outside* of arbitration, the FAA provides that class-action rights are presumptively waivable *in the specific context of arbitration agreements*. Thus, even when federal law *expressly creates* a right for plaintiffs to use a "class mechanism," the Supreme Court has "rejected th[e] proposition" that this right is "nonwaivable . . . in arbitration." *Italian Colors*, 133 S. Ct. at 2310; *see also Gilmer*, 500 U.S. at 32 ("[T]he fact that the [statute] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred."). The same conclusion has even greater force here, where the NLRA does not even *mention* class-action rights, much less clearly override the FAA's specific rule that such rights can be waived in arbitration agreements. To the contrary, the NLRA

indisputably allows individual employees to opt out of class actions, and it would be anomalous to treat arbitration agreements as a disfavored *means* of opting out.

For these reasons, it is highly doubtful that the NLRA even *can* be read to prohibit agreements to arbitrate on an individual basis. But in any event, it certainly does not contain the type of "clear and manifest" indication that would be necessary to overcome the *protection* that such agreements enjoy under the FAA. *Posadas*, 296 U.S. at 503.

In holding otherwise, the decision below not only defies the decisions of this Court, but also squarely conflicts with three other circuits. On the specific question presented here, the Eighth Circuit has explained that the NLRA "falls short of the 'contrary congressional command' required to override the FAA." *Owen*, 702 F.3d at 1052–54; *Cellular Sales*, 824 F.3d at 775–76. The Second Circuit has expressly agreed, *Sutherland*, 726 F.3d at 297 n.8, as has the Fifth Circuit. The Fifth Circuit, in particular, has recognized that the "general language" of the NLRA is not a sufficiently clear "congressional command" to displace the FAA's protection of individual arbitration agreements, given that "much more explicit language has been rejected in the past." *D.R. Horton*, 737 F.3d at 360–61. The Fifth Circuit has also recognized that the NLRA cannot be read to create a non-waivable, "substantive right to proceed collectively," because any such right "has been foreclosed by prior decisions." *Id.* at 361 (citing *Gilmer*, 500 U.S. at 32). Moreover, because the NLRA was enacted "prior to the advent in 1966 of modern class action practice," it cannot easily be read to

"protect[] a right of access to a procedure that did not exist" at the time. *Id.* at 362.

In contrast to these decisions, the Ninth Circuit held in the decision below that the NLRA's general protection of "concerted activities" imposes a "clear" and "unambiguous" ban on individual arbitration agreements. Pet. App. 6a, 11a. The Ninth Circuit's decision thus implicates a square split on this issue too.

C. *Chevron* Deference Does Not Apply To Agency Interpretations That Would Repeal Prior Federal Law

As an alternative way to reach the same result, both the Ninth Circuit and the Seventh Circuit concluded that the Board is entitled to *Chevron* deference in interpreting the NLRA to prohibit individual arbitration agreements. *See Lewis*, 823 F.3d at 1153; Pet. App. 11a n.5 (stating that the Board's interpretation of the NLRA merits deference because it "is a permissible construction" of the statute). The Seventh Circuit held that "[t]he Board's interpretation is, at a minimum, a sensible way to understand the statutory language, and thus we must follow it." *Lewis*, 823 F.3d at 1153. Then, in order to "harmonize the FAA and NLRA," the court held that "the FAA's saving clause" must be read to accommodate the Board's view of the NLRA. *Id.* at 1157–59.

This reasoning is exactly backwards because it requires the FAA *statute* to give way to an *agency interpretation*. On multiple occasions, this Court has made clear that agencies are bound to follow statutes, not the other way around. Consequently, in order to

be faithful to this Court's decisions, the Board's interpretation of the NLRA must be *constrained* by the FAA, and cannot be transformed into an authoritative basis to *displace* the FAA.

To determine whether an agency interpretation is entitled to any deference, courts must first "apply[] the normal 'tools of statutory construction'" to determine whether the agency has any latitude to construe the statute. *INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001) (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)). *See also FCC v. NextWave Pers. Commc'ns. Inc.*, 537 U.S. 293, 304 (2003) (recognizing that interpretive rules "circumscribe[]" the realm of "permissible [agency] action" under *Chevron*). Here, the dispositive "tool of statutory construction" is the canon against implied repeals: because the NLRA contains no clear indication that the NLRA was intended to displace the FAA's protection of individual arbitration agreements, the Board is not permitted to achieve that result by administrative fiat.[2]

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[2] Other circuits, including the Ninth Circuit itself, have recognized the same basic point: Where "the presumption[] . . . against implied repeals remove[s] any potential ambiguity that an agency might otherwise resolve, *Chevron* deference has no role to play." *Ledezma-Galicia v. Holder*, 636 F.3d 1059, 1075 (9th Cir. 2010). No "deference may be accorded to an agency's view" of whether "one statutory scheme supersedes the other." *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134, 149 (2d Cir. 2003) (citation omitted). *See also Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352, 1374 (Fed.

Applying the same logic, this Court has "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002). "[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942).

In light of these principles, each of the Second, Fifth, and Eighth Circuits have recognized that courts "owe no deference to [the Board's] reasoning" in construing the NLRA to displace the FAA by prohibiting individual arbitration agreements. *Sutherland*, 726 F.3d at 297 n.8; *D.R. Horton*, 737 F.3d at 356, 361; *Owen*, 702 F.3d at 1054. These decisions squarely conflict with the conclusion below that courts "must follow" the Board's interpretation of the NLRA. *Lewis*, 823 F.3d at 1153; Pet. App. 11a n.5.[3]

(continued...)

Cir. 2005) (Dyk, J., dissenting) (A "policy-driven interpretation under *Chevron* cannot override the clear command of a conflicting statute"); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring) ("Rules of interpretation bind all interpreters, administrative agencies included.").

[3] The Seventh Circuit stated as an alternative holding that the Board's interpretation is entitled to *Chevron* deference. *Lewis*, 823 F.3d at 1153. The Ninth Circuit

Finally, the issue of *Chevron* deference makes this case particularly worthy of review because it also provides an opportunity for this Court to reaffirm the crucial importance of the major-questions doctrine in constraining the overreach of the NLRB. As this Court has long recognized, "[d]eference to the Board cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption . . . of major policy decisions properly made by Congress." *NLRB v. Fin. Inst. Emps. of Am., Local 1182*, 475 U.S. 192, 202 (1986) (ellipsis in original); *see generally King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (warning against agency deference on "question[s] of deep economic and political significance"). That principle applies directly here, where the Board has attempted to revolutionize the entire field of workplace relations by suddenly reinterpreting the NLRA to prohibit individual arbitration agreements in virtually every employment relationship in the country for the first time in the 80-year history of the statute. Putting aside the inherent implausibility of such a significant prohibition lying dormant in the NLRA for eight decades without anybody noticing, such a sweeping

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(continued...)

expressly agreed with that conclusion, despite disclaiming any "need" to reach the issue. Pet. App. 11a & n.5. Moreover, as petitioners note, the Board "participated in this case before the Ninth Circuit as an amicus curiae, and would presumably continue to do so in this Court if certiorari is granted" here. Pet. 22. The circuit split on the *Chevron* issue will thus be fairly presented and fully briefed if this Court grants review.

policy change cannot and should not be imposed at the unilateral discretion of the executive branch.

II. California Employers Have an Especially Acute Interest In Combating the Growing Trend of Judicial Hostility to Arbitration

This case makes a fitting vehicle to review the question presented because, out of all the states in the union, California employers suffer uniquely from the judicial hostility to arbitration exemplified by the decision below. This hostility is reflected in, among other things, this Court's reversal of several California decisions refusing to enforce arbitration agreements under the FAA in recent years. *See, e.g., DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015); *Concepcion*, 563 U.S. at 341 (2011); *Preston v. Ferrer*, 552 U.S. 346 (2008); *Perry v. Thomas*, 482 U.S. 483 (1987); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *see also* Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L. J. 39, 54, 66 (2006).

This Court's decision in *Concepcion* has been a special target of defiance in California. Just last year in *Imburgia*, this Court admonished a California appellate court that while "[l]ower court judges are certainly free to note their disagreement with the decisions of this Court," they may not "refus[e] to recognize [its] superior authority." 136 S. Ct. at 468. "*Concepcion* is an authoritative interpretation of [the FAA]," and, "[c]onsequently, the judges of [lower courts] must follow it." *Id.* "The fact that *Concepcion* was a closely divided case, resulting in a decision

from which four Justices dissented, has no bearing on that undisputed obligation." *Id.*

Another example of the defiance of *Concepcion* is the recent decision of the California Supreme Court in *Iskanian v. CLS Transportation of Los Angeles, LLC*, 59 Cal. 4th 348 (2014), *cert denied*, 135 S. Ct. 1155 (2015). In that case, the court announced a new, non-waivable right to bring "representative" actions under the California Private Attorney Generals Act (PAGA). This is a clear end-run around *Concepcion* because it authorizes private class counsel to disregard employees' agreements to arbitrate on an individual basis, and instead to seek mass awards for alleged class-wide violations of the California Labor Code. Even more distressingly, moreover, a divided panel of the Ninth Circuit recently *agreed* with *Iskanian*'s anti-arbitration holding, thus joining in the effort to undermine *Concepcion*. *See Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 434 (9th Cir. 2015). The decision below now adds yet another example of the same.

California employers have for years struggled to enforce valid arbitration agreements in the face of an ingenious array of "devices and formulas" erected by California state judges and legislators intent on ignoring this Court's jurisprudence. *Concepcion*, 563 U.S. at 342 (2011). But now, alarmingly, the Ninth Circuit appears to be getting in on the game. This is not just a problem for California, but for the entire national economy: Like the Petitioner in this case, many California-based employers do business nationwide or in multiple states, and are thus subject to differing outcomes when seeking to enforce their arbitration agreements in different circuits. Other

national and international employers also have a significant portion of their workforce in California, and thus have no choice but to contend with the anti-arbitration animus apparent in the decision below. Accordingly, *amicus* the Employers Group submits that granting review in the present case will send a much-needed message to both state and federal judges in California that this Court will continue to enforce the authority of its FAA precedents without flinching, and with a vigilant eye.

III. This Case Is the Best Vehicle to Resolve the Acknowledged Circuit Split

Compared to the other petitions now pending in *Epic* and *Murphy Oil*, Nos. 16-285 & 16-307, this case is the better vehicle to resolve the question presented for two reasons.

First, this case has a dissent. As a result, the law and facts underpinning the majority's decision have already been carefully scrutinized in Judge Ikuta's thorough dissenting opinion, thus minimizing the chance of a lurking vehicle problem. The extensive back-and-forth between the dissent and the majority help to ensure that all relevant issues have been fully ventilated, and that the majority opinion presents the best argument that can possibly be made in support of its remarkable conclusion.

Second, this case embodies the squarest possible split on the question presented, since the Second Circuit has upheld the precise same arbitration agreement that the Ninth Circuit invalidated in the decision below. *See Sutherland*, 726 F.3d at 297 n.8; Pet. 22–23. The presence of the same arbitration agreement on both sides of the split ensures that

there is a square *legal* division among the circuits, with no possible factual distinctions that could explain the different outcomes. This is particularly important since at least one member of this Court has expressed the view that the permissibility of invalidating an arbitration agreement under the FAA may turn on whether there were any "defects in the making of [the] agreement." *Concepcion*, 563 U.S. at 353. (Thomas, J., concurring). Here, the "making of [the] agreement" was the same as in *Sutherland*.

CONCLUSION

For the foregoing reasons, *amicus* supports Petitioners' petition for certiorari, and respectfully requests that the petition be granted.

Respectfully submitted,

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RECORD AND BRIEFS

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ERNST & YOUNG LLP AND
ERNST & YOUNG U.S. LLP,

Petitioners,

v.

STEPHEN MORRIS AND
KELLEY MCDANIEL,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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INTEREST OF *AMICUS CURIAE*[1]

The International Association of Defense Counsel (IADC), established in 1920, is an association of approximately 2,500 corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, culpable defendants are held liable for appropriate damages, and non-culpable defendants are exonerated and can defend themselves without unreasonable cost. In particular, the IADC has a strong interest in the fair and efficient administration of class actions as well as arbitrations, both of which are increasingly global in reach.

The abiding interest of the IADC in the benefits of arbitration is exemplified by its participation as *amicus* before this Court in several cases concerning federal arbitration law, including, inter alia, *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463

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[1] No counsel for a party authored this brief in whole or in part. Neither a party, nor its counsel, nor any other entity other than *amicus curiae* and counsel has made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for the parties were timely notified of the *amicus*' intent to file this brief under Sup. Ct. R. 37.2(a), and all parties have filed general letters with the Clerk's office consenting to the filing of *amicus* briefs or have separately consented to the filing of this brief.

(2015); and *Lewis v. Epic Systems*, 823 F.3d 1147 (7th Cir. May 26, 2016), petition for cert. pending, Case No. 16-285.

SUMMARY OF THE ARGUMENT

The petition for writ of certiorari arises from an undisputed, deepening circuit split – originating with the Seventh Circuit's opinion in *Lewis v. Epic Systems* and deepening with the Ninth Circuit's opinion in this case – concerning an issue of federal statutory interpretation and the enforceability of arbitration agreements with class action or collective action waivers in the employment context. In this *amicus* brief, we provide additional reasons why this Court's guidance concerning the impact of the National Labor Relations Act (NLRA) on the enforceability of such arbitration agreements under the Federal Arbitration Act (FAA) is needed now, and not later.

In the decision below, the Ninth Circuit departed from the Second, Fifth and Eighth Circuits and joined the Seventh Circuit in holding that employer-employee agreements to arbitrate employment disputes on an individual basis are impermissible restrictions on employees' rights to act in concert under the NLRA and therefore unenforceable under the FAA. Notably, the Ninth Circuit's ruling directly contravenes the Second Circuit's ruling in *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2013) (per curiam), in which the Second Circuit found the same arbitration agreement to be

valid and enforceable and reversed the district court's denial of Petitioner's motion to compel arbitration. Like the Seventh Circuit, the Ninth Circuit reached this conclusion by improperly beginning its analysis with a determination that such agreements could be deemed unlawful under the NLRA and then looking to whether the FAA changed this result. Instead, both courts should have begun with the presumption of enforceability required by the FAA and this Court's prior decisions.

This Court should grant review now because the Ninth Circuit's holding increases the potential for collateral unfair labor practice litigation before the National Labor Relations Board (NLRB) for employers across the country. Where employers seek to compel individual arbitration of employment disputes pursuant to a lawful arbitration agreement, they may face unfair labor practice charges from the NLRB asserting that, by seeking to compel arbitration, they committed an unfair labor practice[2] – even if they successfully compelled arbitration in a jurisdiction that enforces arbitration agreements with class action waivers. And because the NLRA's broad appellate venue provisions preclude any certainty regarding where such NLRB decisions may be heard on appeal, there is no guarantee that an appeal of an NLRB order invalidating an

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[2] This approach amounts to punishing an employer for invoking its arbitration rights and improperly threatens the "emphatic federal policy in favor of arbitral dispute resolution" underlying the FAA, which this Court has reaffirmed multiple times. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 105 S. Ct. 3346, 3356 (1985).

arbitration agreement and declaring an employer to have engaged in an unfair labor practice will be heard in the same jurisdiction as the one that heard the motion to compel arbitration.

Thus, the uncertainty created by the circuit split concerning the enforceability of employment arbitration agreements has repercussions across the country. As a result, this Court should not wait for the circuit split to deepen even further before taking up the issue.

ARGUMENT

I. The Ninth Circuit's Analysis Incorrectly Burdens the Proponent of Arbitration in Contravention of this Court's Analysis in *CompuCredit Corp. v. Greenwood*.

The FAA declares that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA, and FAA section 2 in particular, was intended to "'revers[e] centuries of judicial hostility to arbitration agreements,' by 'plac[ing] arbitration agreements upon the same footing as other contracts.'" *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974)). The FAA reflects "a 'liberal federal policy favoring arbitration.'" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 340 (2011) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24

(1983); *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)). This Court has repeatedly held that the "fundamental principle [is] that arbitration is a matter of contract," *Concepcion*, 563 U.S. at 339 (quoting *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010)); *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989), and that courts must enforce arbitration agreements according to their terms, *Volt*, 489 U.S. at 478; *Stolt-Nielsen*, 559 U.S. at 682; *Concepcion*, 563 U.S. at 339.

This Court has repeatedly upheld agreements requiring the parties to arbitrate disputes individually, rather than on a class or collective basis. *See, e.g.*, *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308-10 (2013); *Concepcion*, 563 U.S. at 352. And this Court has further explained that these principles apply "even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command." *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). These principles have been applied equally to employment disputes, even where the claims at issue implicated federal statutes that expressly provide for class or collective action litigation. *See, e.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (employee's claims under the Age Discrimination in Employment Act must be arbitrated "even if the arbitration could not go forward as a class action").

In contravention of this Court's precedent, the NLRB determined in 2012 that agreements requiring individual arbitration of employment disputes unlawfully interfere with employees' rights to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection" under NLRA Section 7. *D.R. Horton, Inc.*, 357 NLRB 2277, 2279 (2012); *see also* 29 U.S.C. § 157. The NLRB further concluded that such agreements violate NLRA Section 8(a)(1), which makes it an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [Section 7]." *Id.* at 2280; *see also* 29 U.S.C. § 158(a)(1). The NLRB accordingly ordered the employer-respondent to cease and desist from invoking a mandatory arbitration agreement with class and collective action waivers, and to rescind or revise its existing arbitration agreement to clarify that it did not constitute a waiver of the right to maintain employment-related class or collective actions. *Id.* at 2289.

NLRB orders are not self-enforcing. Rather, if an employer does not voluntarily comply with a remedial order issued by the NLRB, the NLRB may file a petition for enforcement with a United States circuit court of appeals within any circuit where the unfair labor practice in question occurred or where the person alleged to have committed an unfair labor practice resides or transacts business. 29 U.S.C. § 160(e). Similarly, "any person aggrieved by a final order of the [NLRB]" may obtain judicial review and seek to have the order modified or set aside by "any United States

court of appeals in the circuit in which the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business," or in the D.C. Circuit. 29 U.S.C. § 160(f). The employer-respondent in *D.R. Horton* filed a petition for review in the Fifth Circuit, and the NLRB filed a cross-application for enforcement. The Fifth Circuit ultimately refused to enforce the portion of the NLRB's order invalidating the employer's arbitration agreement on the basis of its class and collective action waivers, finding the NLRB's hostility to such waivers in employee arbitration agreements to be incompatible with the FAA. *D.R. Horton, Inc. v. Nat'l Labor Relations Bd.*, 737 F.3d 344, 364 (5th Cir. 2013).

Despite the Fifth Circuit's refusal to enforce the NLRB's order in *D.R. Horton*, employee-plaintiffs have begun citing the NLRA in opposition to employer-defendants' attempts to enforce agreements to arbitrate employment disputes on an individual basis. Until recently, this argument met little success. The Second Circuit affirmed the validity of the same arbitration agreement that the Ninth Circuit rejected here (*Sutherland*, 726 at 297 & n.8), and the Fifth and Eighth Circuits and the Supreme Courts of California and Nevada also rejected the argument that the NLRA renders unenforceable employee-employer agreements to resolve employment disputes in individual arbitration. *See Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 776 (8th Cir. 2016); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052, 1054-55 (8th Cir. 2013); *D.R. Horton, Inc. v. Nat'l Labor Relations Bd.*, 737 F.3d 344 (5th Cir. 2013);

Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129, 141 (Cal. 2014); *Tallman v. Eighth Jud. Dist. Ct.*, 359 P.3d 113, 122-23 (Nev. 2015).

But the Ninth Circuit in this case, like the Seventh Circuit, reached the opposite conclusion in employment cases involving motions to compel arbitration, concluding that arbitration agreements with class or collective action waivers were unenforceable under the NLRA. Both decisions relied on the FAA's savings clause, which creates an exception to the FAA's presumption of enforceability "upon such grounds as exist at law or in equity for the revocation of any contract" 9 U.S.C. § 2, and rejected this Court's prescribed analysis in *CompuCredit*, under which courts are required to determine whether another federal statute like the NLRA contains a "contrary congressional command" to that of the FAA. 132 S. Ct. at 669. Rather, the Ninth Circuit began with the conclusion that NLRA Section 7 creates a "substantive right" to the collective pursuit of "work-related legal claims" and that an employment arbitration agreement with a class or collective action waiver "interferes with" concerted legal action, and "cannot be enforced." Pet. App. at 1a. Like the Seventh Circuit, the Ninth Circuit relied on the FAA's savings clause to conclude that the FAA "does not dictate a contrary result." *Id.* at 12a.

Judge Ikuta dissented from the majority opinion below, taking issue with virtually every step of the majority's reasoning. (*See id.* at 25a-42a). As Judge Ikuta explained, the relevant inquiry under *CompuCredit* is whether an express "contrary congressional command"

appears in the statute at issue. *Id.* (citing *CompuCredit*, 132 S. Ct. at 669). If not, the statute can and should be harmonized with the FAA, which furthers the strong federal policy in favor of arbitration. *Id.* But the Ninth Circuit majority inverted this analysis by beginning with the NLRA and requiring the proponent of arbitration to show that the FAA overrides the NLRA, rather than beginning with the FAA's presumption that arbitration agreements are enforceable as written and requiring the party opposing arbitration to identify a "contrary congressional command" overriding the FAA. *See* 9 U.S.C. § 2; *CompuCredit*, 132 S. Ct. at 669. As the dissent concluded, this "erroneous reasoning leads to a result that is directly contrary to Congress's goals in enacting the FAA." (*See id.* at p. 40a).

II. The NLRA's Broad Appellate Jurisdiction Provisions Ensure that the Split of Authority Concerning the Enforceability of Employment Arbitration Class or Collective Action Waivers Will Reverberate Across the Country.

The Seventh and Ninth Circuits' hostility to arbitration agreements with class action waivers affects employers outside those circuits. This is because both courts' decisions pave the way for employee-plaintiffs opposing arbitration to file collateral unfair labor practice charges against employers who seek to assert their rights under the FAA.

As Petitioners' brief notes (*see* p. 23), an employer's "ability to enforce its uniform nationwide arbitration provision depends on where a given employee is located (or where the employee files suit)." But even if an employer may have a modicum of certainty regarding its ability to successfully compel arbitration in the Second, Fifth, or Eighth Circuits, that does not preclude collateral unfair labor practice litigation before the NLRB. This is because the logical consequence of the position that class and collective litigation is a protected "substantive" right is that any employer opposition to class or collective actions via efforts to enforce a provision requiring individual arbitration unlawfully "interferes with" this putative "right" in violation of NLRA Section 8(a)(1). *See* 29 U.S.C. § 158(a)(1). In accordance with this interpretation, the NLRB has not limited itself to ordering employers to rescind or revise arbitration agreements with class or collective action waivers, as it did in *D.R. Horton*. Instead, the NLRB has taken its hostility to such agreements to its logical conclusion, ordering employers to reimburse employee-plaintiffs for fees spent opposing motions to compel individual arbitration. *See, e.g., Bloomingdale's, Inc.*, 363 NLRB No. 172, 2016 NLRB LEXIS 314 at *26 (Apr. 29, 2016).

Neither the FAA nor this Court's prior decisions support treating efforts to enforce lawful, valid arbitration agreements like a poison pill that invites significant litigation costs and collateral litigation.

Nevertheless, attorneys representing plaintiffs[3] in employment class actions have already seized on the increased leverage that a tactical unfair labor practice charge may confer; so long as the circuit split remains, this practice will be encouraged. Thus, an employer facing an employment class action may successfully compel arbitration in a state or federal district court, and further successfully defend on appeal the court's order compelling the parties to arbitration. But the NLRB may still pursue that employer in collateral unfair labor practice litigation. *See id.* at **15-26 (Apr. 29, 2016) (ordering employer to reimburse all fees expended by plaintiffs incurred in unsuccessfully opposing employer's motion to compel arbitration, even though the Ninth Circuit affirmed the agreement's enforceability, and that its opt-out provision rendered it voluntary and not unlawful under the NLRA); *see also Johnmohammadi v. Bloomingdale's*, 755 F.3d 1072 (9th Cir. 2014).

Moreover, because an appeal of an NLRB decision ordering the reimbursement of attorneys' fees incurred in opposition to a successful motion to compel arbitration may be heard in nearly any circuit, an employer may face inconsistent rulings and punishment for enforcing an arbitration provision that was already found

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[3] Because the NLRB's rules permit charges to be filed by "any person," 29 C.F.R. § 102.9, an attorney representing a group of employees may file such a charge, even if no class members file a charge themselves. *See Labor Ready Sw., Inc., and Jason Kuller, Esq. of Thierman Law Firm, P.C.*, 363 NLRB No. 138, 2016 NLRB LEXIS 159 (Feb. 26, 2016).

to be enforceable by a different federal circuit court or a state supreme court.

There is no certainty at the outset of unfair labor practice litigation that an appeal of an NLRB order invalidating such an agreement will land in a specific venue. "[A]ny person" who is "aggrieved" by an NLRB order may obtain review of the order in either the circuit in which the unfair labor practice was alleged to have been committed, the circuit wherein such person resides or transacts business, or the Court of Appeals for the District of Columbia. 29 U.S.C. § 160(f). Further, even if an employer timely files a petition for review in its home circuit, another petition may be filed in another circuit by another person "aggrieved" by that NLRB order. When these competing petitions for review are filed in different circuits on the same day, the conflict is resolved by the judicial panel on multidistrict litigation selecting a circuit "by means of random selection" and consolidating all other petitions for review of the NLRB's order there. 28 U.S.C. § 2112(a)(3); *see also Samsung Elecs. Am., Inc. v. NLRB*, No. 16-60089 (5th Cir. 2016), *consolidated sub nom. Jorgie Franks v. NLRB*, No. 16-10644 (11th Cir. 2016). Such consolidated appeals could easily end up in the Seventh or Ninth Circuits.

As a result, employers across the country – even those who "reside or transact business" outside the Seventh or Ninth Circuits – cannot know whether the lawfulness of their arbitration agreements will be assessed in a jurisdiction that is faithful, or hostile, to

such agreements. This uncertainty may well lead employers to assess whether to promulgate, maintain, or enforce arbitration agreements in light of the least-protective jurisdictions, which would further undermine the Congressional policy expressed in the FAA.

We urge this Court to remedy the perverse incentives for gamesmanship and tactical unfair labor practice litigation created by the Ninth Circuit's decision and the attendant deepening circuit split.

CONCLUSION

For the foregoing reasons and for the reasons expressed in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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RECORD AND BRIEFS

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Supreme Court of the United States

ERNST & YOUNG LLP AND
ERNST & YOUNG U.S. LLP,

Petitioners,

v.

STEPHEN MORRIS AND KELLY MCDANIEL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation ("NELF") seeks to present its views, and the views of its supporters, on whether certiorari should be granted to decide whether, in the case of an employment arbitration agreement that precludes class and collective actions, the mandate to enforce such an agreement under the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), is overridden by § 7 of the National Labor Relations Act, 29 U.S.C. § 157, which protects an employee's right "to engage in concerted activities for . . . mutual aid or protection."[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977, and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

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[1] Pursuant to Supreme Court Rule 37.6, NELF states that no counsel for a party authored NELF's proposed amicus brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Rule 37.2(a), NELF states that it has provided counsel for all parties with timely written notice of NELF's intent to file this brief, and that counsel for all parties have filed with the Court a blanket letter of consent to the filing of amicus briefs in this case.

NELF is committed to upholding the FAA's mandate to enforce class and collective action waiver contained in valid arbitration agreements. This serves the FAA's purpose to allow parties to fashion a streamlined arbitral process for the speedy private resolution of disputes. NELF is also committed to upholding the FAA's mandate with respect to the arbitration of federal statutory claims, unless that statute provides a "contrary congressional command" that clearly overrides the FAA's mandate to enforce such waivers. When the federal statute at issue fails to displace the FAA's mandate, here by failing to provide for a nonwaivable right to pursue group legal action, the FAA requires courts to enforce the disputed class and collective arbitration waiver according to its terms.

In addition to this amicus brief, NELF has filed many other related amicus briefs in this Court, arguing for the enforcement of arbitration agreements according to their terms under the FAA.[2]

For these and other reasons discussed below, NELF believes that its brief will assist the Court in deciding whether to grant certiorari in this case.

SUMMARY OF ARGUMENT

This Court should grant certiorari and decide that the NLRA does not displace the FAA's mandate to enforce class and collective action waivers

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[2] *See DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

contained in employment arbitration agreements. To escape their contractual obligations to arbitrate disputes on an individual basis only, the respondents in this case would have to show that the NLRA announces a "contrary congressional command" that employees have the nonwaivable right to pursue group legal action against their employer. But the NLRA contains no such contrary congressional command. The statute makes no mention of class actions and was enacted decades before the advent of the modern class action. Nor does the NLRA mention collective actions or even provide for an *individual* right of action. Congress could not have intended to provide employees with nonwaivable procedural rights associated with a nonexistent right of action.

The NLRA's "right . . . to engage in . . . concerted activities for . . . mutual aid or protection" lacks the specificity and directness that this Court has required for a federal statute to override the FAA's mandate to enforce arbitration agreements according to their terms. Under *CompuCredit v. Greenwood*, 132 S. Ct. 665 (2012), a contrary congressional command should announce itself clearly on the face of a statute. Such an intent should not be "found" in the interstices of a statute, and certainly not by engaging in a strained interpretation of the statutory language "concerted activities."

As with the Credit Repair Organization Act ("CROA") under review in *CompuCredit*, the NLRA is also silent on the issue of invalidating the disputed terms of an arbitration agreement. At

issue in *CompuCredit* was whether the CROA overrode a contractual term to submit claims to binding arbitration. At issue here is whether the NLRA overrides the contractual term to arbitrate all employment-related disputes on an individual basis only. In both cases, the federal statute at issue says nothing about the enforceability of the disputed contractual term. Therefore, the FAA's mandate to enforce the arbitration agreement according to its terms remains undisturbed for both CROA and NLRA claims. Accordingly, the respondents' class and collective action waiver should be enforced.

This is confirmed by the NLRA's statement of purpose, which makes no mention of legal action of any kind. To the contrary, the NLRA was expressly intended to avoid "industrial strife" through the "friendly adjustment of industrial disputes," 29 U.S.C. § 151, by protecting the employee's right to self-organization in order to *negotiate* on an equal footing with the employer over the terms and conditions of employment. This clear purpose of achieving industrial peace through negotiated compromise is incompatible with the *coercive* aims of a class or collective legal action, with its attendant threat of exacting an "in terrorem" settlement from the employer.

The Ninth Circuit's reliance on *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), is entirely misplaced. *Eastex* did not involve any judicial action taken by employees, did not involve the FAA, and did not even interpret the NLRA's "concerted activities" language. Instead, that case decided the entirely unrelated issue whether employees acted "for mutual aid or

protection" under the NLRA if they acted outside of the immediate employer-employee relationship, by taking political action with respect to work-related issues.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI AND DECIDE THAT THE NATIONAL LABOR RELATIONS ACT DOES NOT DISPLACE THE FEDERAL ARBITRATION ACT'S MANDATE TO ENFORCE CLASS AND COLLECTIVE ACTION WAIVERS IN EMPLOYMENT ARBITRATION AGREEMENTS.

At issue is whether this Court should grant certiorari and decide whether, in the case of an employment arbitration agreement that precludes class and collective actions, the mandate to enforce such an agreement under the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), is overridden by § 7 of the National Labor Relations Act, which protects an employee's right "to engage in . . . concerted activities for . . . mutual aid or protection . . . ." 29 U.S.C. § 157.[3]

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[3] Section 7 of the NLRA provides, in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

29 U.S.C. § 157.

A divided panel of the Ninth Circuit in this case, along with the Seventh Circuit in a case that is also before this Court on a petition for certiorari,[4] has held that the NLRA overrides the FAA by providing employees with a nonwaivable right to pursue group legal action against their employer. The Fifth Circuit, however, has held to the contrary, in a case that is *also* before the Court on a petition for certiorari.[5] Accordingly, certiorari should be granted to resolve the split of authority on this important issue of federal law.

A. Nowhere Does The NLRA State That Employees Have The Nonwaivable Right To Pursue Group Legal Action Against Their Employer.

The Court should grant certiorari and decide that the NLRA does not displace the FAA's mandate to enforce class and collective action waivers contained in employment arbitration agreements. "[C]ourts must rigorously enforce arbitration agreements according to their terms, . . . including terms that specify [how] . . . the parties choose to arbitrate their disputes," such as by restricting arbitration to individual claims only. *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (citations and internal quotation marks omitted). *See also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) ("Requiring the availability of

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[4] *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *petition for cert. filed* (Sept. 2, 2016) (No. 16-285).

[5] *NLRB v. Murphy Oil USA, Inc.*, 808 F.3d 1013 (5th Cir. 2015), *petition for cert. filed* (Sept. 9, 2016) (No. 16-307).

classwide arbitration [by invalidating a class action waiver] interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (FAA requires enforcement of agreement to arbitrate employment claims under ADEA).

To escape their contractual obligation to arbitrate disputes on an individual basis only, the respondents in this case would have to show that the NLRA announces a "contrary congressional command" that employees have the nonwaivable right to pursue group legal action against their employer. *See Italian Colors*, 133 S. Ct. at 2309. (FAA's mandate "holds true for claims that allege a violation of a federal statute, unless the FAA's mandate has been 'overridden by a contrary congressional command.'") (citations and internal quotation marks omitted) (quoting *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012)). *See also Gilmer*, 500 U.S. at 26 ("[T]he burden is on [the employee] to show that Congress intended to preclude a waiver of a [class or collective legal action] for [NLRA] claims.").

But the NLRA contains no such contrary congressional command that guarantees an employee the right to pursue group legal action against his employer. As with the Sherman and Clayton Acts under review in *Italian Colors*, the NLRA, enacted in 1935, "make[s] no mention of class actions" and was "enacted decades before the advent [in 1966] of Federal Rule of Civil Procedure 23 . . . ." *Italian Colors*, 133 S. Ct. at 2309.

Nor does the NLRA provide that employees have the right to seek a collective action, or even an *individual* action, against their employer. Instead, Congress saw fit to delegate exclusive enforcement powers to the NLRB to prosecute claims of unfair labor practices.[6] Congress could not have intended to provide employees with nonwaivable procedural rights associated with a nonexistent right of action.

Nor, for that matter, does the NLRA even mention arbitration agreements. *See CompuCredit*, 132 S. Ct. at 672 (only federal statutes making express reference to arbitration agreements can override FAA's mandate to arbitrate disputes covered by such agreements). In short, Congress has not "evinced an intention [in the NLRA] to preclude a waiver of" class or collective procedures. *Gilmer*, 500 U.S. at 26. Therefore, the FAA should require the respondents to comply with their contractual obligation to arbitrate disputes on an individual basis only.

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[6] *See* 29 U.S.C. § 160(a) ("Powers of Board generally") ("The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice . . . .").

B. An Employee's NLRA Right "To Engage In . . . Concerted Activities For . . . Mutual Aid Or Protection" Falls Far Short Of The Specificity And Directness Required Under *CompuCredit v. Greenwood* To Override The FAA's Mandate.

To be sure, the NLRA provides employees with "the right . . . to engage in . . . concerted activities for . . . mutual aid or protection . . . ." 29 U.S.C. § 157. But this "concerted activities" language lacks the specificity and directness that this Court has required for a federal statute to supplant the FAA's mandate to enforce arbitration agreements according to their terms. *See CompuCredit*, 132 S. Ct. at 670 (holding that Credit Repair Organization Act, 15 U.S.C. §§ 1679-1679j ("CROA"), does not displace FAA's mandate, even though CROA provides right to judicial remedy and bars waiver of statutory rights).

At issue in *CompuCredit* was whether the CROA provided a nonwaivable right to sue in federal court in the first instance, thereby overriding the FAA's mandate to enforce an agreement to arbitrate such claims. *See CompuCredit*, 132 S. Ct. at 668-671. The Court held that the CROA did not do so, even though it did provide a private right of judicial action and did bar the waiver of rights under that statute. *See id.* at 669. The Court concluded that "[b]ecause the CROA is *silent* on whether claims under the Act can proceed in an arbitrable forum, . . . the FAA requires the arbitration agreement to be

enforced according to its terms." *Id.* at 673 (emphasis added).

In short, *CompuCredit* teaches that a contrary congressional command should announce itself clearly on the face of a statute. Such an intent should not be "found" in the interstices of a statute, and certainly not by engaging in a strained interpretation of the statutory language "concerted activities."

Notably, the only federal statutes that the Court in *CompuCredit* identified as announcing a contrary congressional command made *express* reference to predispute arbitration agreements:

> When [Congress] has restricted the use of arbitration in other contexts, it has done so with *a clarity that far exceeds the claimed indications* in the CROA. *See, e.g.*, 7 U.S.C. § 26(n)(2) (2006 ed., Supp. IV) ("*No predispute arbitration agreement* shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section"); 15 U.S.C. § 1226(a)(2) (2006 ed.) ("Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for *the use of arbitration* to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all

> parties to such controversy consent in writing to use arbitration to settle such controversy"); *cf.* 12 U.S.C. § 5518(b) (2006 ed., Supp. IV) [Dodd-Frank Act] (granting authority to the newly created Consumer Financial Protection Bureau to regulate *predispute arbitration agreements* in contracts for consumer financial products or services).

CompuCredit, 132 S. Ct. at 672 (emphasis added).

By contrast, the NLRA's clipped and general "concerted activities" language falls far short of these statutory examples discussed in *CompuCredit* because the language does *not* state that employees have a nonwaivable right to pursue group legal action against their employer. Only such precise and direct statutory language could satisfy *CompuCredit*.

As with the CROA under review in *CompuCredit*, the NLRA is also silent on the issue of invalidating the terms of an arbitration agreement. At issue in *CompuCredit* was whether the CROA overrode the contractual term to submit claims to binding arbitration. At issue here is whether the NLRA overrides the contractual term to arbitrate all employment-related disputes on an individual basis only. In both cases, the federal statute at issue says nothing about the enforceability of the disputed term in the arbitration agreement. Therefore, the FAA's mandate to enforce the arbitration agreement according to its terms remains undisturbed for both

CROA and NLRA claims. Accordingly, the respondents' class and collective action waiver should be enforced.

C. The NLRA's Statement Of Purpose Further Defeats Any Congressional Intent To Provide Employees With The Nonwaivable Right To Pursue Group Legal Action.

As with the other NLRA sections discussed above, the NLRA's statement of purpose makes no mention of an employee's right to pursue group (or even individual) legal action against his or her employer. In fact, the statement of purpose appears to be antithetical to coercive legal action of any kind, let alone endorse "the risk of 'in terrorem' settlements that class actions entail . . . ." *Concepcion*, 563 U.S. at 350.

In particular, the NLRA's stated purpose is to avoid "industrial strife" (such as strikes and employer lock-outs) by encouraging the "*friendly adjustment* of industrial disputes" through "collective *bargaining*," and "by restoring equality of *bargaining* power between employers and employees . . . for the purpose of *negotiating* the terms and conditions of their employment . . . ." 29 U.S.C. § 151 ("Findings and declaration of policy") (emphasis added).

Clearly, the NLRA's purpose is "to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the *mediatory influence of negotiation*." *Fibreboard*

Paper Prods. Corp. v. NLRB, 379 U.S. 203, 211 (1964) (emphasis added). This clear statutory purpose of achieving industrial peace through negotiated compromise would be incompatible with the coercive thrust of a class or collective legal action, with its attendant threat of exacting an "in terrorem" settlement from the employer, regardless of the merits of the dispute.

In sum, the NLRA does not evince a congressional intent to override, or even address, the FAA's mandate to enforce class and collective action waivers contained in employment arbitration agreements. Certiorari should therefore be granted to uphold the FAA's mandate to enforce those agreements according to their terms.

II. THE COURT'S DECISION IN *EASTEX v. NLRB* PROVIDES NO SUPPORT FOR THE NINTH CIRCUIT'S OPINION.

The Ninth Circuit has relied extensively on *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), to support its conclusion that the NLRA protects an employee's right to pursue group legal action against his or her employer. *See* Petition for Certiorari, Appendix ("App.") A, 3a, 7a, 8a, 10a. But the lower court's reliance on *Eastex* is entirely misplaced.

Unlike this case, *Eastex* did not involve any judicial action taken by employees, did not involve the FAA, and did not even interpret the NLRA's "concerted activities" language. Instead, that case decided the entirely unrelated issue whether employees acted "for mutual aid or protection" under § 7 of the NLRA if they acted outside of the

immediate employer-employee relationship, by engaging in political efforts to influence state and federal governmental action on work-related issues.[7]

To be sure, the Court in *Eastex* acknowledged, in passing, that "it has been held that the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums . . . ." *Eastex*, 437 U.S. at 566. But this is merely *dictum* to the Court's holding that the "mutual aid or protection" clause can extend beyond the workplace to include the proposed political activity discussed in the union newsletter at issue.[8] Moreover, none of the NLRB

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[7] In *Eastex*, employees sought to distribute a union newsletter on the employer's property that, among other things, urged employees to write their state legislators to voice their opposition to efforts to incorporate the state "right-to-work" statute into the state constitution, and to take political action against the President's veto of a bill to increase the federal minimum wage. *Eastex*, 437 U.S. at 559-60. The employer refused to allow employees to distribute the newsletter. *See id.* at 560-61. The employer argued that the proposed political action discussed in the newsletter would not be protected under the NLRA's "mutual aid or protection" clause because employees would be acting "through channels outside the immediate employee-employer relationship." *Id.* at 565.

The Court rejected the employer's position and held that the "mutual aid or protection" clause could apply to employees' actions taken outside the workplace. *Id.* at 565-67. The Court then proceeded to review and approve the NLRB's findings in that case that the proposed political activity in the union newsletter would be protected by the "mutual aid or protection" clause. *Id.* at 569-70.

[8] *See* n.7, above.

decisions that the Court cited for this proposition involved a class or collective action. *See id.*, 437 U.S. at 566 n.15.

And finally, the Court in *Eastex* emphasized that "[w]e do not address here the question of what may constitute 'concerted' activities in th[e] context" of administrative or judicial forums. *Id.* *See also* App. A., 36a (Ikuta, J., dissenting) (discussing same). That is, the Court in *Eastex* declined, even in *dictum*, to address the very issue presented in this case--whether the NLRA's "concerted activities" language protects the particular procedural form of an employee's judicial action.

In short, *Eastex* provides no support for the Ninth Circuit's opinion, and certiorari should therefore be granted to reverse the lower court and enforce the FAA's mandate in employment arbitration agreements.

CONCLUSION

For the reasons stated above, NELF respectfully requests that this Court grant the petitioners' petition for certiorari.

Respectfully submitted,

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RECORDS AND BRIEFS

No. 16-300

IN THE
Supreme Court of the United States

ERNST & YOUNG LLP, AND ERNST & YOUNG U.S. LLP,
Petitioners,

v.

STEPHEN MORRIS AND KELLY MCDANIEL,
Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

BRIEF OF THE RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the collective-bargaining provisions of the National Labor Relations Act prohibit the enforcement under the Federal Arbitration Act of an agreement requiring an individual to arbitrate claims against an employer on an individual, rather than collective, basis.

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INTEREST OF *AMICUS CURIAE*[1]

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and contributes to legal proceedings affecting the retail industry. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. The RLC frequently files amicus briefs on behalf of the retail industry.

The members of the RLC have a strong interest in the outcome of this proceeding. Many of the RLC's members and affiliates include arbitration agreements in their employment contracts because arbitration allows all parties to resolve disputes quickly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in

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[1] Pursuant to this Court's Rule 37.2(a), *amicus* timely notified all parties of its intention to file this brief. Counsel for all parties have submitted letters to the Clerk granting blanket consent to *amicus* briefs. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

court. Relying on the legislative policy reflected in the Federal Arbitration Act ("FAA"), and this Court's consistent recitation of the federal policy favoring arbitration, many of the RLC's members have structured employment relationships with their substantial employee pools around arbitration agreements.

These agreements typically require that arbitration be conducted on an individual, rather than a class or collective, basis. As this Court explained in *AT&T Mobility LLC v. Concepcion*, collective resolution of claims on an aggregate or class-wide basis is "not arbitration as envisioned by the FAA" and "lacks its benefits"—the simplicity, informality, and expedition that are characteristics of arbitration. 563 U.S. 333, 351 (2011).

The National Labor Relations Board ("Board") has taken the position that individual arbitration agreements with employees are unfair labor practices under the National Labor Relations Act ("NLRA"). That position, if it were to prevail, would invalidate millions of arbitration agreements, to the detriment of both employers and employees. This petition presents the question whether the Board's position is correct. The members of the RLC therefore have a strong interest in this proceeding.

SUMMARY OF ARGUMENT

The Court should grant certiorari to resolve the circuit split over the enforceability of individualized arbitration agreements. The conflict of authority is causing serious practical problems for employers: they

do not know whether a basic and widespread provision of employment agreements is legal. This problem is particularly acute for national employers (such as the RLC's members) that operate in multiple, if not all, jurisdictions of the United States. As a practical matter, and for reasons of predictability and fairness across a wide employee base, it is very difficult for such an employer to have agreements with different terms depending on the location of the employee. The circuit split is also creating opportunities for forum-shopping, both for class action plaintiffs and for employers seeking review of the Board's orders.

The Court should grant certiorari in this case, and should hold the Board's petition for certiorari in *NLRB v. Murphy Oil USA, Inc.*, No. 16-307 (pet. filed Sept. 9, 2016), in abeyance pending disposition of this case. *Murphy Oil* is an inferior vehicle for considering the issue for four reasons. First, this case presents the paradigmatic procedural context in which the question presented will arise, whereas the procedural posture in *Murphy Oil* is comparatively unusual. Second, the unusual procedural posture in *Murphy Oil* raises collateral constitutional questions that this case lacks. Third, a decision in *Murphy Oil* might not resolve the question presented as applied to ordinary private employment disputes. Fourth, the Board's question presented in *Murphy Oil* is poorly stated and will unnecessarily limit the scope of issues before this Court.

On the merits, prohibiting individualized arbitration agreements would harm both employers and employees. If employers are barred from entering into

individualized arbitration agreements, they will abandon arbitration altogether. Litigation is slower and more expensive than arbitration, and consigning employee disputes to litigation will lead to workplace disharmony. Moreover, there is no empirical evidence that employees—as opposed to class action lawyers—are more likely to recover damages in litigation than arbitration.

ARGUMENT

I. The Circuit Split Over The Enforceability of Individualized Employee Arbitration Agreements Is Causing Substantial Practical Problems that Warrant This Court's Immediate Review.

This case presents the question whether employment agreements requiring disputes to be resolved through individual arbitration are enforceable. The Board has taken the position that such agreements violate the NLRA, notwithstanding the FAA's command that such agreements are enforceable. *See Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (Oct. 28, 2014), *enforcement denied*, 808 F.3d 1013 (5th Cir. 2015). As the petition explains, the Seventh and Ninth Circuits have agreed with the Board's position, while the Second, Fifth, and Eighth Circuits have rejected it. Pet. 11-14.

This circuit split is causing significant practical problems for employers. At present, individualized arbitration agreements are legal in three circuits; illegal in two circuits; and of unknown legal status in the remaining circuits. This conflict of authority leaves

employers with three unappealing choices. They can enter into individualized arbitration agreements with all new employees, and face the risk of Board enforcement actions. Or they can stop entering into such arbitration agreements altogether, and subject themselves to cumbersome dispute resolution procedures which would prove unnecessary if this Court rejects the Board's position. Or they can vary their employment agreements depending on the judicial circuit in which their employees are located, and continue to rewrite those agreements on a circuit-by-circuit basis each time a new judicial opinion comes out. Leaving employers in this legal limbo is untenable, and it is imperative that the Court resolve the question nationwide.

The circuit split will also lead to two types of forum-shopping. First, class-action lawyers will flock to courts within the Seventh and Ninth Circuits and seek to certify nationwide classes, in order to evade the decisions in the Second, Fifth, and Eighth Circuits holding that individualized arbitration agreements are enforceable. As a result, an employee's status as a class member will depend on whether his employer has a national or a regional scope. Consider, for example, two employers that enter into individualized arbitration agreements with all of their employees: one that operates exclusively in Texas, and one that operates in both Texas and California. Employees of the first employer will never become members of an employee class, because individualized arbitration agreements are enforceable within the Fifth Circuit. But a California-based employee of the second

employer can seek to certify a *national* class—including employees based in Texas—on the theory that, in the Ninth Circuit's view, federal law prohibits the enforcement of individualized arbitration agreements nationwide. An employee's ability to serve as a class member should not turn on whether the employer happens to have operations within other judicial circuits.

Second, petitions for review of Board orders may be brought "within any circuit ... wherein [the petitioner] transacts business." 29 U.S.C. § 160(e). Thus, if the Board declares an employer to have committed an unfair labor practice based on an individualized arbitration agreement, the employer will be guaranteed to obtain reversal of the Board's order—as long as it happens to have operations in the 13 states comprising the Second, Fifth, and Eighth Circuits. The *Murphy Oil* case illustrates the forum-shopping problem. In that case, a federal district court within the Eleventh Circuit enforced an individualized arbitration agreement against an employee, precipitating an enforcement action by the Board. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1016 (5th Cir. 2015). If Murphy Oil's operations were limited to the Eleventh Circuit, it would have been forced to file a petition for review in the Eleventh Circuit, and it would have faced the risk of losing if the Eleventh Circuit chose to follow the Seventh and Ninth Circuit's positions. But because Murphy Oil happened to have operations in Texas, it was able to file its petition in the Fifth Circuit—which guaranteed victory, given that the Fifth Circuit had already held that individualized employee arbitration

agreements are enforceable. *Id.* (citing *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013)). The Board's ability to enforce an order related to an employee in one judicial circuit should not turn on the happenstance of whether the employer operates in other judicial circuits.

The circuit split will also cause confusion as to the effect of arbitration awards rendered in the Second, Fifth, and Eighth Circuits on class actions proceeding in the Seventh and Ninth Circuits. Does an arbitration award, deemed valid in the judicial circuit in which it was rendered, preclude an employee from also being a class member in a judicial circuit in which the same arbitration agreement is deemed invalid? Head-spinning questions like these are the reason this Court resolves circuit splits.

The practical problems wrought by the circuit split are magnified by the sheer volume of individualized employee arbitration agreements currently in existence. The retail industry employs over 15 million people, including over 4 million retail salespersons, over 2 million cashiers, over 1 million stock clerks, and over 1 million first-line supervisors. Bureau of Labor Statistics, Industries at a Glance: Retail Trade Sector.[2] As a matter of fairness and predictability, a substantial number of retailers utilize individualized arbitration agreements to manage employment-related disputes

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[2] This information is available at http://www.bls.gov/iag/tgs/iag44-45.htm (last visited October 8, 2016). Statistics are current as of either July or August 2016.

for all of their employees. The legality of all those agreements is at stake in this case.

In light of the problems caused by the circuit split, and the widespread nature of individualized arbitration agreements, the Court should grant certiorari and decide this case expeditiously.

II. This Case Is A Better Vehicle Than *Murphy Oil*.

The RLC agrees with Petitioner that this case is the ideal vehicle to consider the question presented. As Petitioner notes, this case presents the conflict of authority in its clearest possible form: the arbitration agreement invalidated by the Ninth Circuit is identical to the arbitration agreement upheld by the Second Circuit in *Sutherland v. Ernst & Young, LLP*, 726 F.3d 290 (2d Cir. 2013). Pet. 22-23. This situation precisely reflects the potential catch-22 in which national retailers could find themselves if the circuit split is not resolved. Moreover, the Ninth Circuit's decision was accompanied by a detailed dissent, ensuring that the arguments on both sides of this important question were fully aired.[3]

The RLC is aware that the Board has filed a separate petition for certiorari challenging the Fifth Circuit's decision in *Murphy Oil*. *See NLRB v. Murphy Oil USA, Inc.*, No. 16-307 (pet. filed Sept. 9, 2016). In

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[3] Alternatively, the Court may wish to consider granting certiorari in this case and consolidating it with *Epic Systems Corp. v. Lewis*, No. 16-285 (pet. filed Sept. 2, 2016), which presents the same question.

the RLC's view, the Court should grant the petition for certiorari in this case, and should hold the Board's petition in *Murphy Oil* until this case is decided.

The Board's petition declares that the Board's presence as a party makes *Murphy Oil* the best vehicle. *See Murphy Oil* Pet. 22 n.9, 23 n.10, 2016 WL 4761717. But the mere fact that the government is a party to litigation does not, in and of itself, make a case a superior vehicle for this Court's review. Indeed, as explained below, there are four reasons why this case would be a markedly better vehicle than *Murphy Oil*.

First, as Petitioner states, this case presents the paradigmatic procedural context in which the question presented will arise: a lawsuit brought by an employee in which the employer seeks to compel arbitration. Pet. 2.

By contrast, *Murphy Oil* arises in the context of a Board enforcement action against an employer that successfully moved to compel arbitration. That procedural posture is the exception rather than the rule: employee arbitration agreements are so widespread that the Board cannot possibly pursue an enforcement action in any more than a small fraction of cases where an employer compels arbitration of a dispute with an employee. The Court should grant certiorari in a case that presents a realistic portrayal of the context in which the issue will typically arise.

Second, in addition to being unusual, *Murphy Oil*'s procedural posture is also awkward. In *Murphy Oil*, an employee brought a putative collective action against Murphy Oil in the Northern District of

Alabama. Murphy Oil successfully moved to dismiss that collective action and compel individual arbitration. The Board then conducted an enforcement proceeding against Murphy Oil, and concluded, by a 3-2 vote, that Murphy Oil's successful motion to dismiss constituted an unfair labor practice under the NLRA. *See* 808 F.3d at 1015-16 (describing procedural history). The Fifth Circuit then granted Murphy Oil's petition for review of the Board's decision in relevant part. *Id.* at 1018. Thus, the Board order under review in *Murphy Oil* is, in effect, a collateral attack by the Board on a federal district court's decision.

This unusual procedural posture results in complex constitutional and jurisdictional questions. As the Board's *Murphy Oil* dissenters pointed out, punishing an employer for a *successful* motion to dismiss in a federal District Court raises serious Petition Clause concerns. *See Murphy Oil* Pet. App. 127a, 146a n.15 (citing *BE & K Constr. Co. v. NLRB*, 536 U.S. 516 (2002)). Moreover, it is not even clear that Article III permits the Board to, in effect, reopen a judgment declaring an individualized arbitration agreement to be enforceable. *Cf. Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). It is the Eleventh Circuit, not the Board, which is the proper venue to challenge the Northern District of Alabama's ruling. *Cf. District of Columbia Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). At a minimum, the Court should err on the side of granting certiorari in the case that does not raise these difficult collateral issues.

Third, there is a risk that a decision in *Murphy Oil* would not resolve the question presented as applied to the mine run of cases in which the Board is not a party. If the Court grants certiorari in *Murphy Oil*, the Board may take the position that because the case arises from a Board enforcement proceeding, an extra measure of deference to the Board's conclusions is warranted.

In the RLC's view, this position would be wrong; the Court should review the legal issues *de novo* regardless of whether an appeal arises from private litigation or from a Board enforcement action. "Like other administrative agencies, the NLRB is entitled to judicial deference when it interprets an ambiguous provision of a statute *that it administers*." *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992) (emphasis added). But the Board does not administer the FAA, and as this Court has held, "the Board's interpretation of a statute ... far removed from its expertise merit[s] no deference from this Court." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 143-44 (2002). Thus, the Court owes no deference to the Board's efforts to reconcile the NLRA with the FAA. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528-29 (1984) (rejecting Board's application of the NLRA that conflicted with Bankruptcy Code); *id.* at 529 n.9 ("While the Board's interpretation of the NLRA should be given some deference, the proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is novel. We see no need to defer to the Board's interpretation of Congress's intent in passing the Bankruptcy Code.").

Nevertheless, if the Board argues that some aspect of the agency decision is entitled to deference, there is a risk that the Court's decision will not apply to lawsuits that do *not* arise in the context of Board enforcement actions—which, as noted above, will be most lawsuits. Granting certiorari in the instant case, rather than in *Murphy Oil*, will prevent that prospect from arising.

Fourth, the question presented in *Murphy Oil* is poorly stated and will artificially truncate the scope of the issues before this Court. The Board's question presented is as follows:

> Whether arbitration agreements with individual employees that bar them from pursuing work-related claims on a collective or class basis in any forum are prohibited as an unfair labor practice under 29 U.S.C. 158(a)(1), because they limit the employees' right under the National Labor Relations Act to engage in "concerted activities" in pursuit of their "mutual aid or protection," 29 U.S.C. 157, and are therefore unenforceable under the saving clause of the Federal Arbitration Act, 9 U.S.C. 2.

Murphy Oil Pet. i.

Framed as such, the Board's question presented assumes the premise that *if* individualized arbitration agreements are illegal under the NLRA, *then* they would be unenforceable under the FAA's savings clause. The FAA's savings clause provides that arbitration agreements may be invalidated upon "grounds as exist at law or in equity for the revocation of any contract"; thus, according to the Board's

premise, a rule declaring individualized arbitration agreements to be illegal *constitutes* "grounds as exist at law or in equity for the revocation of any contract," and permits an arbitration agreement to be invalidated without any further inquiry.

But that premise directly conflicts with this Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). In *Concepcion*, California had adopted a rule holding that individualized arbitration agreements were illegal. The question before the Court was whether that rule was preempted by the FAA. If the Board's premise was correct, the answer would have been "no." The FAA's savings clause applies to *any* "grounds as exist at law or in equity for the revocation of any contract"—whether such "grounds" are under state law or federal law. 9 U.S.C. § 2. Thus, if, as the Board maintains, a rule declaring individualized arbitration agreements to be illegal constituted "grounds as exist at law or in equity for the revocation of any contract," then California's rule would have fallen within the savings clause, and would not have conflicted with the FAA.

Yet, the Court held that California's rule was preempted, reasoning that "[a]lthough § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." 563 U.S. at 343. In other words, *Concepcion*'s holding was that a rule invalidating individualized arbitration agreements *did not constitute* "grounds as exist at law or in equity for the revocation of any contract," which directly

contradicts the premise of the Board's question presented. Rather, *Concepcion* held that a rule invalidating individualized arbitration agreements conflicted with the FAA. For the identical reason, if the Board is correct that the NLRA invalidates individualized arbitration agreements, then the NLRA, too, conflicts with the FAA.

Of course, just because a federal law conflicts with the FAA, does not mean the FAA automatically prevails. When a state law conflicts with the FAA, the state law is automatically preempted under the Supremacy Clause. By contrast, when a federal law conflicts with the FAA, a different analysis is required: The Court must instead determine whether the federal statute invalidates arbitration agreements in sufficiently clear terms to override the FAA's command. *See generally CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 672-73 (2012). In many statutes—including certain employee causes of action—Congress has indeed stated clearly that arbitration agreements are unenforceable, and the FAA therefore gives way. *See, e.g.*, 18 U.S.C. § 1514A(e)(2) (employee whistleblower statute) ("No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section."). Thus, the question before the Court is whether the NLRA falls within the category of statutes that invalidate arbitration agreements in sufficiently clear terms to override the FAA's command.

The Board's question presented would sweep that question under the rug. Under the Board's framing,

the sole question before the Court is whether the NLRA bars individualized arbitration agreements; if it does, then the savings clause applies and no further analysis is required. The Board's question presented completely ignores the critical question of whether the NLRA speaks with sufficient clarity to override the FAA.

By contrast, the question presented in the instant case captures all of the issues presented by this case: "Whether the collective-bargaining provisions of the National Labor Relations Act prohibit the enforcement under the Federal Arbitration Act of an agreement requiring an individual to arbitrate claims against an employer on an individual, rather than collective, basis." Thus, the Court should grant certiorari in this case, rather than in *Murphy Oil*, in which the question presented is designed to artificially limit the scope of the issues before the Court.

III. Invalidating Individualized Arbitration Agreements Would Have Harmful Consequences For Both Employers and Employees.

On the merits, the Court should hold that individualized arbitration agreements with employees are enforceable. The RLC fully agrees with Petitioner's arguments that the FAA requires enforcement of individualized arbitration agreements, Pet. 15-19, and will not reiterate them here. Rather, the RLC will highlight the deleterious consequences of the Board's position.

If the Court holds that individualized employee arbitration agreements are unenforceable, its decision would spell the end of employee arbitration. Employers would not agree to arbitrate claims if they faced the risk of being forced into class arbitration. As the Court observed in *Concepcion*, "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." 563 U.S. at 348. Further, given that a single class action can lead to enormous liability, employers would be unwilling to sacrifice the elaborate discovery, cumbersome procedures, and layers of appellate review that characterize litigation in court. Consider, for instance, the historic *Wal-Mart* litigation, in which the Ninth Circuit upheld the certification of a class of 1.5 million Wal-Mart employees, only to be reversed unanimously by this Court. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). If the order certifying the class had been left intact, Wal-Mart would have faced the risk of a gargantuan damages award. There is no way a rational employer would leave such a momentous class-certification decision to a single arbitrator, subject only to exceedingly deferential judicial review.

Thus, abolishing individualized employee arbitration would mean abolishing employee arbitration altogether. That would harm both employers and employees. Employers, of course, have a strong incentive to avoid class actions that may lead to *in terrorem* settlements, with large sums flowing to class-action lawyers. But abolishing arbitration would harm

employees too. Arbitration is an inexpensive and speedy way of resolving disputes. *Concepcion*, 563 at 345 ("[T]he informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution."). And both the low cost and the speed of arbitration are in employees' interests.

First, many employment cases are low-value disputes, and the cost of litigating them may well exceed the employee's expected recovery. Thus, consigning these claims to litigation will mean that employees will never be able to bring them at all. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) ("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contract."). For these employees, class actions are no panacea—as *Wal-Mart* demonstrates, many types of employee claims cannot be brought as class actions. Even if the employee winds up as a class member, the employee will yield the fate of his case to a class action lawyer without a meaningful voice in how the case is litigated or resolved.

By contrast, arbitration is sufficiently cheap that employees can pursue all but the lowest-value claims. It is common for employers to cover the vast majority of the fee for initiating an arbitration so that arbitration can be an affordable option for its employees. For example, one of the RLC's members enters into a standard arbitration agreement with its employees, in which it promises to pay all of the American

Arbitration Association's costs and all arbitrator's fees, except for a $200 contribution from the employee—which it reimburses to the employee if the employee prevails in the arbitration. And while employees may be required to pay their own attorney's fees (as in litigation), those fees will be far cheaper in the arbitration context, in which the parties forego expensive discovery procedures. Thus, arbitration may be the only realistic mechanism for an employee to bring his dispute with his employer before a neutral third party. Abolishing employee arbitration would preclude employees from bringing many claims altogether. *See* Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 Disp. Resol. J. 9, 11 (2003) (citing empirical evidence that "lower-income employees cannot afford to take ... employment-related claims to court," and "arbitration may be the sole forum for their claims").

Second, the need for speedy dispute resolution is of particular import in the employment context. Employee litigation is unique in that it pits two who may have an ongoing relationship against each other. An employee who is bringing claims against his employer while still on the job must also cooperate with his employer on a day-to-day basis. Especially in these cases, it is critical to adopt a dispute resolution process that preserves workplace harmony to the greatest possible extent. In the experience of the RLC's members, the arbitration process ensures that disputes can be quickly resolved without adversarial procedures.

This problem is exacerbated in the class action context. It is difficult to conceive of a procedural device

more antithetical to the goal of speedy and informal dispute resolution than the class action. The notion that class actions will promote the NLRA's goal of workplace cooperation is divorced from reality.

Not only does litigation result in concrete harms to employees, but there is no evidence of any corresponding benefit. The available evidence shows that litigation in general, and class actions in particular, do not result in greater recoveries for employees than arbitration. Empirical analysis has shown that employees are no more likely to prevail in litigation than in arbitration. Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Resol. J. 56, 58 (2004) ("[O]ur findings show that there is a statistically greater probability of a plaintiff winning a discrimination case before an arbitrator than in federal court."); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 46 (1998) ("Comparisons of the result rates in arbitration versus litigation reveal that, contrary to what many would expect, employees prevail more often in arbitration than in court."). And there is a rich literature arguing that class actions typically are far more lucrative for class counsel than they are for the class. *See, e.g.*, Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 618-19 (2010); John H. Beisner et al., *Class Action 'Cops': Public Servants or Private Entrepreneurs?*, 57 Stan. L. Rev. 1441 (2005). There is simply no real-world basis

for the Board's assumption that forcing employees into court will make them better off.

Arbitration is good for employers and good for employees. The Court should not interpret the NLRA as a straightjacket that prohibits employers and employees from entering into these mutually beneficial agreements. The Court should hold that individualized employee arbitration agreements are enforceable.

CONCLUSION

The petition for writ of certiorari should be granted, and the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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October 11, 2016

ECORD
AND
RIEFS

FILED
JUN - 9 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-300

In the Supreme Court of the United States

ERNST & YOUNG LLP, ET AL., PETITIONERS

v.

STEPHEN MORRIS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: SEPTEMBER 8, 2016
CERTIORARI GRANTED: JANUARY 13, 2017

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The following opinions, decisions, judgments, and orders have been omitted in printing the joint appendix because they appear as appendices to the petition for certiorari as follows:

Appendix A:	Court of appeals opinion, Aug. 22, 2016
Appendix B:	District court order, July 9, 2013
Appendix C:	District court judgment, July 23, 2013

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13-16599

STEPHEN MORRIS, and KELLY MCDANIEL, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

v.

ERNST & YOUNG, LLP, and ERNST & YOUNG U.S., LLP,
Defendants-Appellees.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
08/07/2013	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL SEND MQ: Yes. The schedule is set as follows: Mediation Questionnaire due on 08/14/2013. Transcript ordered by 09/06/2013. Transcript due 10/07/2013. Appellants Kelly McDaniel and Stephen Morris opening brief due 11/15/2013. Appellees Ernst & Young U.S., LLP and Ernst & Young, LLP answering brief due 12/16/2013. Appellant's optional reply brief is due 14

DATE	NO.	PROCEEDINGS
		days after service of the answering brief. [8734384] (GR) [Entered: 08/07/2013 12:34 PM]
		* * * * *
07/16/2014	12	Submitted (ECF) Opening Brief and excerpts of record for review. Submitted by Appellant Stephen Morris. Date of service: 07/16/2014. [9172231] -- [COURT UPDATE: Attached corrected brief. 7/18/2014 by TL] (Libenson, Ross) [Entered: 07/16/2014 07:02 PM]
		* * * * *
09/12/2014	18	Submitted (ECF) Answering Brief and supplemental excerpts of record for review. Submitted by Appellees Ernst & Young U.S., LLP and Ernst & Young, LLP. Date of service: 09/12/2014. [9238809] (Heinke, Rex) [Entered: 09/12/2014 01:12 PM]
		* * * * *
10/24/2014	25	Submitted (ECF) Reply Brief for review. Submitted by Appellant Stephen Morris. Date of service: 10/24/2014. [9290360] -- [COURT UPDATE: Attached corrected brief. 10/29/2014 by TL] (Folkenflik, Max) [Entered: 10/24/2014 05:15 PM]

DATE	NO.	PROCEEDINGS
		* * * * *
10/28/2015	35	Filed (ECF) National Labor Relations Board Motion to become amicus curiae. Includes proposed additional citations. Date of service: 10/28/2015. [9736393] [13-16599] -- [COURT UPDATE: Updated docket text to reflect correct ECF filing type. 10/28/2015 by TYL] (Thomas, Paul) [Entered: 10/28/2015 02:10 PM]
		* * * * *
10/28/2015	37	Filed (ECF) Appellant Stephen Morris citation of supplemental authorities. Date of service: 10/28/2015. [9736490] [13-16599] (Folkenflik, Max) [Entered: 10/28/2015 02:42 PM]
10/28/2015	38	Filed (ECF) Appellant Stephen Morris Correspondence: Request for Judicial Notice. Date of service: 10/28/2015 [9736502] [13-16599] (Folkenflik, Max) [Entered: 10/28/2015 02:47 PM]
		* * * * *
10/29/2015	43	Filed (ECF) Appellees Ernst & Young U.S., LLP and Ernst & Young, LLP response opposing motion ([35] Motion (ECF Filing), [35] Motion (ECF Filing) motion to become amicus). Date of service:

DATE	NO.	PROCEEDINGS
		10/29/2015. [9738525] [13-16599] (Heinke, Rex) [Entered: 10/29/2015 04:05 PM]
10/30/2015	44	Filed order (SIDNEY R. THOMAS, SANDRA S. IKUTA and ANDREW D. HURWITZ) The motion of the National Labor Relations Board ("Board") for leave to file an amicus curiae brief is GRANTED. The amicus material submitted on October 28, 2015 shall be filed. The Board is also permitted to file a formal amicus brief with the Court on or before November 6, 2015. The brief may not exceed 7000 words. If the Board elects to file an amicus brief, the parties are permitted to file supplemental response briefs on or before November 13, 2015. These supplemental briefs may not exceed 3500 words. [9738959] (OC) [Entered: 10/30/2015 09:32 AM]
		* * * * *
11/06/2015	52	Submitted (ECF) Amicus Brief for review. Submitted by Amicus Curiae NLRB. Date of service: 11/06/2015. [9747668] [13-16599] (Vol, Kira) [Entered: 11/06/2015 12:27 PM]
		* * * * *

DATE	NO.	PROCEEDINGS
11/06/2015	54	Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by LABOR LAW SCHOLARS. Date of service: 11/06/2015. [9747925] [13-16599] (Rothner, Glenn) [Entered: 11/06/2015 02:17 PM]
		* * * * *
11/13/2015	56	Submitted (ECF) Supplemental Brief for review. Submitted by Appellees Ernst & Young U.S., LLP and Ernst & Young, LLP. Date of service: 11/13/2015. [9755516] [13-16599] – [COURT UPDATE: Updated docket text to reflect correct brief type. 11/13/2015 by TYL] (Heinke, Rex) [Entered: 11/13/2015 04:23 PM]
		* * * * *
11/13/2015	58	Submitted (ECF) Supplemental Brief for review. Submitted by Appellant Stephen Morris. Date of service: 11/13/2015. [9755760] [13-16599] – [COURT UPDATE: Attached corrected brief. 11/17/2015 by TYL] (Folkenflik, Max) [Entered: 11/13/2015 07:27 PM]
		* * * * *
11/17/2015	61	ARGUED AND SUBMITTED TO SIDNEY R. THOMAS, SANDRA

DATE	NO.	PROCEEDINGS
		S. IKUTA and ANDREW D. HURWITZ. [9758775] (JT) [Entered: 11/17/2015 01:13 PM]
		* * * * *
06/02/2016	63	Filed (ECF) Appellants Kelly McDaniel and Stephen Morris citation of supplemental authorities. Date of service: 06/02/2016. [9999571] [13-16599] (Folkenflik, Max) [Entered: 06/02/2016 09:57 AM]
06/07/2016	64	Filed (ECF) Amicus Curiae NLRB citation of supplemental authorities. Date of service: 06/07/2016. [10005210] [13-16599] (Platt, Nancy) [Entered: 06/07/2016 01:17 PM]
06/13/2016	65	Filed (ECF) Appellees Ernst & Young U.S., LLP and Ernst & Young, LLP citation of supplemental authorities. Date of service: 06/13/2016. [10012908] [13-16599] (Heinke, Rex) [Entered: 06/13/2016 03:36 PM]
08/22/2016	66	FILED OPINION (SIDNEY R. THOMAS, SANDRA S. IKUTA and ANDREW D. HURWITZ) Putative-amici labor scholars' motion for leave to file an amicus brief is denied. See Fed. R. App. P. 29(e). The motion for judicial notice of additional authorities is also denied. See Louis Vuitton Malletier, S.A. v.

DATE	NO.	PROCEEDINGS
		Akanoc Sols., Inc., 658 F.3d 936, 940 n.2 (9th Cir. 2011). REVERSED AND REMANDED; Judge: SRT Authoring, Judge: SSI Dissenting, FILED AND ENTERED JUDGMENT. [10094519] (RMM) [Entered: 08/22/2016 06:57 AM]
		* * * * *
09/21/2016	70	MANDATE ISSUED.(SRT, SSI and ADH) [10131425] (MT) [Entered: 09/21/2016 01:18 PM]

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 12-CV-04964-JSW

STEPHEN MORRIS, and KELLY MCDANIEL, on behalf of themselves and all others similarly situated,
Plaintiffs,

v.

ERNST & YOUNG, LLP, and ERNST & YOUNG U.S., LLP,
Defendants.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
02/02/2012	1	COMPLAINT against Ernst & Young U.S., LLP, Ernst & Young, LLP. (Filing Fee $ 350.00, Receipt Number 465401028628) Document filed by Stephen Morris. (mro) (ama). (Entered: 02/06/2012)
		* * * * *
04/11/2012	12	AMENDED COMPLAINT amending 1 Complaint against Ernest & Young U.S., LLP, Ernst & Young, LLP with JURY DEMAND. Document filed by Stephen Morris, Kelly McDaniel. Related

DATE	NO.	PROCEEDINGS
		document: 1 Complaint filed by Stephen Morris. (mro) (ama). (Entered: 04/11/2012)
		* * * * *
05/08/2012	24	MOTION to Transfer Case */Venue.* Document filed by Ernst & Young U.S., LLP, Ernst & Young, LLP. (Knopp, Gregory) (Entered: 05/08/2012)
		* * * * *
05/09/2012	30	ANSWER to 12 Amended Complaint. Document filed by Ernst & Young U.S., LLP, Ernst & Young, LLP. (Knopp, Gregory) (Entered: 05/09/2012)
		* * * * *
06/12/2012	33	MEMORANDUM OF LAW in Opposition re: 24 MOTION to Transfer Case */Venue.* Document filed by Kelly McDaniel, Stephen Morris. (Folkenflik, Max) (Entered: 06/12/2012)
		* * * * *
06/22/2012	35	REPLY MEMORANDUM OF LAW in Support re: 24 MOTION to Transfer Case */Venue.* Document filed by Ernst & Young U.S., LLP, Ernst & Young, LLP. (Knopp, Gregory) (Entered: 06/22/2012)

DATE	NO.	PROCEEDINGS
09/11/2012	36	OPINION AND ORDER: re: 24 MOTION to Transfer Case /*Venue.* filed by Ernst & Young U.S., LLP, Ernst & Young, LLP. For the foregoing reasons, Defendants' Motion to Transfer Venue to the Northern District of California is GRANTED. The Clerk of Court is directed to close this case. Any pending motions are moot. (Signed by Judge Kimba M. Wood on 9/10/2012) (jfe) (Entered: 09/11/2012)
09/11/2012		CASE TRANSFERRED OUT ELECTRONICALLY from the U.S.D.C. Southern District of New York to the United States District Court - Northern District of California. (jfe) (Entered: 09/18/2012)
		* * * * *
01/11/2013	42	MOTION TO DISMISS OR in the ALTERNATIVE, STAY PROCEEDINGS AND COMPEL ARBITRATION filed by Ernst & Young L.L.P. Motion Hearing set for 2/15/2013 09:00 AM in Courtroom 6, 4th Floor, San Jose before Hon. Ronald M. Whyte. Responses due by 1/25/2013. Replies due by 2/1/2013. (Attachments:# 1 Declaration Daria Hodapp ISO Motion to Dismiss, # 2 Exhibit A to Decl. of Daria Hodapp, # 3 Exhibit B to

DATE	NO.	PROCEEDINGS
		Decl. of Daria Hodapp, # 4 Exhibit C to Decl. of Daria Hodapp, # 5 Declaration Ingrid McGuire ISO Motion to Dismiss, # 6 Exhibit A to Decl. of Ingrid McGuire, # 7 Exhibit B to Decl. of Ingrid McGuire, # 8 Exhibit C to Decl. of Ingrid McGuire, # 9 Exhibit D to Decl. of Ingrid McGuire, # 10 Exhibit E to Decl. of Ingrid McGuire, # 11 Declaration Gregory W. Knopp ISO Motion to Dismiss, # 12 Exhibit A to Decl. of Gregory W. Knopp, # 13 (Proposed) Order) (Knopp, Gregory) (Filed on 1/11/2013) Text modified on 1/11/2013 (bw, COURT STAFF). (Entered: 01/11/2013)
		* * * * *
01/28/2013	49	MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS MOTION TO STAY OR COMPEL ARBITRATION re 42 filed by Stephen Morris. (Libenson, Ross) (Filed on 1/28/2013) Text modified on 1/29/2013 (bwS, COURT STAFF). (Entered: 01/28/2013)
		* * * * *
02/04/2013	54	Reply in Support of Motion to Dismiss, or in the Alternative Stay Proceedings and Compel Arbitration re 42 filed by Ernst & Young

DATE	NO.	PROCEEDINGS
		U.S., LLP, Ernst & Young L.L.P. (Attachments: # 1 Declaration of Christopher Petersen ISO Defendants' Reply ISO of Their Motion to Dismiss, # 2 Exhibit A to Declaration of Christopher Petersen, # 3 Exhibit B to Declaration of Christopher Petersen, # 4 Exhibit C to Declaration of Christopher Petersen, # 5 Exhibit D to Declaration of Christopher Petersen, # 6 Exhibit E to Declaration of Christopher Petersen) (Knopp, Gregory) (Filed on 2/4/2013) Modified on 2/5/2013 (bw, COURT STAFF). (Entered: 02/04/2013)
		* * * * *
02/15/2013	56	Minute Entry: Motion Hearing held on 2/15/2013 before Ronald M. Whyte (Date Filed: 2/15/2013) re 42 MOTION to Dismiss, *or in the Alternative, Stay Proceedings and Compel Arbitration* filed by Ernst & Young L.L.P. (Court Reporter Lee-Anne Shortridge.) (jg, COURT STAFF) (Date Filed: 2/15/2013) (Entered: 02/15/2013)
		* * * * *
06/28/2013	62	Statement of Recent Decisions re 49 Opposition/Response to Motion, 54 Reply to Opposition/Response, 42 MOTION to Dismiss, or in the

DATE	NO.	PROCEEDINGS
		Alternative, Stay Proceedings and Compel Arbitration by Ernst & Young L.L.P. (Attachments:# 1 Exhibit-A) (Knopp, Gregory) (Filed on 6/28/2013) Modified on 7/12/2013 (bwS, COURT STAFF). (Entered: 06/28/2013)
07/09/2013	63	Order by Hon. Ronald M. Whyte granting 42 Motion to Dismiss (rmwlcl, COURT STAFF) (Filed on 7/9/2013) (Entered: 07/09/2013)
07/24/2013	64	JUDGMENT Signed by Judge Whyte on 7/24/2013. (rmwlcl, COURT STAFF) (Filed on 7/24/2013) (Entered: 07/24/2013)
08/07/2013	65	NOTICE OF APPEAL and Ninth Circuit Rule 3-2 Representation Statement re 63 Order Granting Motion to Dismiss; 54 Judgment. (Appeal fee of $455 receipt number 0971-7904901 paid.) (Folkenflik, Max) (Filed on 8/7/2013) Text modified on 8/8/2013 (bw, COURT STAFF). (Entered: 08/07/2013)

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

No. 12 CIV 0838

STEPHEN MORRIS, and KELLY MCDANIEL, on behalf of themselves and all others similarly situated,
Plaintiffs,

v.

ERNST & YOUNG, LLP, and
ERNST & YOUNG U.S., LLP,
Defendants.

April 11, 2012

AMENDED CLASS ACTION COMPLAINT

(Jury Trial Demanded)

Plaintiffs Stephen Morris ("Morris") and Kelly McDaniel ("McDaniel") (collectively with Morris, "Plaintiffs"), by their attorneys, Folkenflik & McGerity and Hoffman & Lazear, for themselves, and on behalf of all others similarly situated, make the following allegations upon personal knowledge as to each of Plaintiffs for their own acts and facts, and upon information and belief as to all other matters. Plaintiffs brings this class and collective action on behalf of those who suffered damages as a result of the violations of the Federal Fair Labor Standards Act,

and the laws of California, and as a result of other wrongful conduct and improper labor practices committed by Defendant Ernst & Young LLP and Defendant Ernst & Young U.S., LLP (collectively, "Defendants" or "E&Y") and allege as follows:

NATURE OF THE ACTION

1. Plaintiffs brings this lawsuit as a collective action under Section 16(b) of the Federal Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §16(b), and as a class action pursuant to Federal Rules of Civil Procedure Rule 23. The persons Plaintiffs seek to represent are junior accountants: (a) current and former Non-Licensed Senior 1 and Senior 2 (as defined by Defendants) who have been employed by E&Y to perform audits ("Covered Positions") in the United States at any time since January 24, 2009 (the "Federal Eligibility Period"), whom Defendants failed to and continue to fail to pay overtime for work performed in excess of forty (40) hours per week as required by Federal law (the "FLSA Collective"); and (b) current and former Non-Licensed Senior 1, Senior 2, Staff 1 and Staff 2 (hereinafter collectively referred to as "Non-Licensed Seniors and Staff") who have been employed by E&Y in the United States and inside of the State of California at any time since September 15, 2001 (the "California Eligibility Period") whom Defendants failed to and continue to fail to pay overtime for work performed in excess of forty (40) hours per week as required by California law (the "California Class") (together with the FLSA Collective, the "Classes").

2. The Plaintiffs seek to represent classes of persons who are so numerous that the joinder of each member of the class is impracticable.

3. There is a well-defined community of interest in the questions of law and fact affecting the classes and the unnamed plaintiffs which these Plaintiffs seek to represent. The class members' claims against Defendants involve questions of common or general interest, in that their claims are based on Defendants' implementation and utilization of policies pursuant to which all members of the classes were denied payment of wages, overtime compensation during the time in question. These questions are such that proof of a state of facts common to the members of the class will entitle each member of the class to the relief requested in this Complaint.

4. The Plaintiffs will fairly and adequately represent the interests of the Classes, because the Plaintiffs are members of each of the Classes and the claims of the Plaintiffs are typical of those in each of the Classes.

5. Defendants violated the FLSA, 29 U.S.C. §207, by failing to pay members of the FLSA Collective overtime pay for a work week longer than forty (40) hours.

6. Defendants violated Wage Order No. 4 of the California Industrial Welfare Commission ("California Wage Law") which provided during all relevant times that "non-exempt employees must be paid an overtime premium for all hours worked in excess of eight during the workday and in excess of 40 during the workweek, as well as for work performed on the seventh workday in a work week."

7. By failing to pay their Non-Licensed Seniors and Staff in California any such overtime compensation, Defendants violated the rights of their employees in California under California Wage Law.

8. As a result of Defendants' violation of the California and Federal labor laws, Plaintiffs and the members of the Classes were unlawfully under-compensated for their

work, and are entitled to compensatory damages and statutory penalties.

JURISDICTION AND VENUE

9. This Court has jurisdiction pursuant to 28 U.S.C. §1331, the Federal statute in question being the Fair Labor Standards Act, 29 U.S.C. §201, *et seq.*, and 28 U.S.C. §1367(a) as to the claims arising under state law.

10. This Court also has subject matter jurisdiction over all claims pursuant to 28 U.S.C. §1331(d), the Class Action Fairness Act of 2005. On information and belief, the district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000.00, exclusive of interest and costs. This action is a class action and, on information and belief, one or more members of the classes of plaintiffs on whose behalf this action is brought is a citizen of a state different from the Defendants.

11. The United States District Court for the Southern District of New York is proper venue under 28 U.S.C.A. §1391(b)(1) because Defendants' principal place of business is in the city and state of New York, and a substantial part of the events that gave rise to the claims in this action took place in this judicial district.

PARTIES

12. Plaintiff Stephen Morris resides in and is a citizen of the State of California. He was employed by Defendants in Defendants' Los Angeles, California office in its Assurance and Advisory Business Services ("AABS") Division, which is the division performing audits, beginning in January of 2005 in the position of Staff 1 and then was subsequently promoted to the position of Staff 2, and then

Senior 1. He ceased working for Defendants in February of 2007.

13. Plaintiff Kelly McDaniel resides in and is a citizen of the State of California. She was employed by Defendants in Defendants' San Jose, California office in its AABS Division beginning in October of 2008. She was hired as Staff 1 and subsequently promoted to the position of Staff 2, and then Senior 1. She ceased working for Defendants in April 2011.

14. Defendant Ernst & Young LLP ("E&Y LLP") is a Delaware limited liability partnership practicing public accountancy pursuant to applicable state laws on a nationwide basis and including, in particular, in California pursuant to a license with the California Board of Accountancy. E&Y LLP is one of the largest privately held professional services businesses and is headquartered at 5 Times Square, New York, New York. It has over 90 offices throughout the U.S. and in excess of 41,535 employees.

15. Upon information and belief, Defendant Ernst & Young U.S., LLP ("E&Y US")(collectively with E&Y LLP, "E&Y") is a Delaware foreign registered limited liability partnership practicing public accountancy pursuant to applicable state laws, and maintains its principal executive office at 5 Times Square, New York, New York.

16. Upon information and belief, Defendants are the United States member firms of an international network of affiliated public accounting firms that operate under the name Ernst & Young. Both of the Defendants meet the statutory requirements under California Law and the FLSA to be deemed the employer of Plaintiffs and all members of the Classes.

17. The Plaintiffs are former employees of E&Y and those similarly situated to the Plaintiffs are former or current employees of E&Y.

PLAINTIFFS, CLASS AND REPRESENTATIVE ALLEGATIONS

18. Defendants were and are professional services businesses engaged in advisory services, assurance (sometimes known as audit services), tax and transactional advisory services. What is generally referred to as an "audit" is the examination of client prepared financial statements made in accordance with Generally Accepted Auditing Standards ("GAAS"), or certain other recognized similar standards, and the expression of an opinion as to whether the client's financial statements are fairly stated and free of material misstatements. Non-partner employees at E&Y are divided into different categories in the audit division, among them Non-Licensed Staff 1, Staff 2, Senior 1 and Senior 2. These four low-level positions do not require a CPA license. The proposed FLSA Class and California Sub-Class consist entirely of employees and former employees in these four positions, and exclude those who are licensed as CPAs.

19. As unlicensed employees remain at the company for longer periods of time, they are promoted generally annually from positions as Staff 1 to positions as Staff 2, Senior 1 and Senior 2, where they continue to perform many of the same or very similar non-exempt tasks in a "lock-step" fashion based on length of employment. Seniors may also be given the opportunity to participate to some degree in the planning and reporting phases of the audit, review of work of Staff, and being in charge in an audit engagement with responsibilities for the essentially minuscule administrative tasks including assigning tasks to others, collecting their work and communication with

managers or partners about audit progress and any matters of significance. In none of these tasks are the Seniors performing any exempt duties.

20. During all times relevant herein, the members of the Classes supported the business of Defendants by working under the direction of their superiors, the managers and partners of Defendants. Such work involved the members of the Classes assisting their superiors in the production of the products and services provided by the Defendants' business to its customers. Staff were required to discuss any significant answers with managers or partners. Seniors were required to discuss any significant issues with managers or partners. Members of the Classes were prohibited from making any decision on any matter which might be material to the audit or to E&Y's opinion on the financial statements without approval by the partner with final responsibility for the audit. Most of the time, approval must first be sought from one or more levels of more senior employees who then obtain approval from the audit partner.

21. Defendants have intentionally limited the potential for individual discretion and independent judgment of members of the Classes in order to maintain quality controls and to limit liability, as well as to comply with legal and professional requirements.

22. State laws, including California law, generally provide that unlicensed employees engaged in audits must work under the control and supervision of a CPA. Similar rules have been promulgated by the American Institute of Certified Public Accountants ("AICPA"), a professional organization for CPAs, and the Public Company Accounting Oversight Board ("PCAOB"), a private non-profit corporation created by the Sarbanes-Oxley Act to oversee the auditors of public companies.

23. Companies whose financial statements are audited are generally referred to as *audit clients*, and the public accounting firms that perform audits are generally referred to as *audit firms, CPA firms, or independent auditors*. The professional practice of auditing financial statements in the United States is regulated and controlled by a mixture of private-sector and public standard setters and governing authorities.

24. Each individual state government issues CPA licenses for practice in that state and issues regulations that govern the work of accounting professionals within that state. There is a National Association of State Boards of Accountancy (NASBA) that is a voluntary association of state boards of accountancy (the common title of the state agency that regulates the practice of public accountancy in that state). NASBA has issued a Uniform Accountancy Act to be used as a model for accountancy laws in the various individual states.

25. All states have adopted the AICPA-administered Uniform CPA Exam. Each individual state, however, decides what else is required for an individual to be licensed and to work within its borders. State laws also identify those areas of service that are restricted to licensed individuals. All states restrict the service of auditing financial statements to licensed individuals.

26. State laws that affect and control CPAs go beyond licensing and include various rules that govern firms and individuals practicing public accountancy including ethics, quality control, and continuing professional education. These additional rules and regulations have a high degree of similarity and are generally patterned after comparable AICPA requirements. For example, ethics requirements generally are adaptations of the AICPA Code of Professional Conduct.

27. California State has adopted detailed laws, rules, and regulations that govern the practice of public accountancy, and which includes sections that define the profession of public accountancy, restrict the practice of public accountancy and use of the title CPA and similar titles, and establish the requirements for a license as a CPA.

28. The practice of the profession of public accountancy in California State includes *attest services.* Attest services require the independence of the licensee and include "any audit to be performed in accordance with generally accepted auditing standards ("GAAS") or other similar standards developed by a federal government agency, commission, or board or a recognized international or national professional accountancy organization. "Certified public accountant" or "CPA" means any person who has received a license from a state as a certified public accountant for the practice of public accountancy. Only a person licensed or otherwise authorized to practice may practice public accountancy or use the title CPA or similar title.

29. To qualify for a license as a CPA, an applicant must fulfill a series of requirements including having received a bachelor's or higher degree in a recognized program in accountancy, meeting an experience requirement, and passing a satisfactory written examination. The written examination used in most states and in California State is the one prepared and administered by the AICPA, the Uniform CPA Exam.

30. The AICPA is a national, not-for-profit entity that exerts substantial influence on the practice of public accountancy in the United States. Before the creation of the PCAOB by the Sarbanes-Oxley Act in 2002, the SEC had delegated responsibility for setting auditing standards (or GAAS) to the AICPA. The AICPA still sets standards

that govern the audits of the financial statements of non-public companies in the United States. The AICPA prepares and administers the Uniform CPA Exam.

31. The AICPA issues and enforces the Code of Professional Conduct (the "Code"). The Code sets ethical requirements for CPAs and states generally use of the Code as a point of reference in adopting their ethical requirements. Under the Code, virtually any matter of significance in connection with providing audit related accountancy service must be reviewed and approved by the CPA in charge of the engagement, who must *at all times* supervise the unlicensed associates who work on the engagement.

32. The roles of the AICPA contribute substantially to the uniformity of auditing practice across the United States.

33. The PCAOB is a not-for-profit entity in charge of standard setting and oversight of both the audits of public companies and the firms that perform those audits. To audit the financial statements of a public company whose securities are traded in the United States, the audit firm must be registered with the PCAOB. The registered firm's audit practice is routinely inspected by PCAOB inspectors to evaluate whether the firm is performing in accordance with professional standards. If the PCAOB becomes aware of departures from professional standards through inspections or other means, the PCAOB can investigate and, if appropriate, discipline the firm and individual auditors. Under the structure created by SOX, the SEC oversees the professional standards set by the PCAOB. The PCAOB's standards apply to the audits of all public companies whose securities are traded in the United States.

34. When the PCAOB became operational in April 2003, it adopted the existing auditing standards previously issued by the AICPA. The PCAOB has adopted several standards of its own since then.

35. Together, the AICPA and PCAOB standards provide fairly specific requirements that apply to the audits of financial statements. These professional standards govern auditing practice throughout the United States.

36. The SEC is a government agency that regulates publicly traded companies and exercises authority over the reports the companies file with it and over the stock exchanges. As previously explained, the SEC must authorize all PCAOB rules and standards before they become effective.

37. On information and belief, most of the audit clients of E&Y in the United States are publicly traded companies or subsidiaries of public corporations.

38. The AICPA, PCAOB, and SEC all have rules that require the auditor of financial statements to be *independent* and that spell out in detail actions that impair independence of the audit firm, including prohibited activities by firm personnel. All the authorities state that performing management functions of a client impairs independence. Thus, no one working on an audit team can be involved in running the business of audit clients. This requirement of independence is uniformly required throughout the United States.

39. E&Y's internal standards provide strict limits on what activities can be performed by employees who are not CPAs. An unlicensed E&Y employee *cannot* (i) commit E&Y to an audit engagement; (ii) approve preliminary engagement activities, including the exercise of judgment

to assess the potential risk of a potential audit engagement; (iii) approve and sign engagement letters; (iv) work without control and supervision of the licensed CPA; (v) approve or depart from the audit plan/program; (vi) approve and sign any document containing a substantive opinion, conclusion or determination, including audit opinions, audit reports, internal control opinions on public companies (SOX 404 reviews), or certify financial statements; or (vii) advise client management on matters of significance. Likewise, it is E&Y's policy that Class members are not permitted to deviate from firm policies and procedures without approval.

40. Plaintiff Morris was an employee of Defendants commencing in January 2005, until February 2007. Throughout that time period, Morris was not a licensed CPA and was assigned to provide services on audit engagements. Initially, his job title was Staff 1. In or about September 2005, he was "promoted" to Staff 2, and in or about September 2006, he was "promoted" to Senior 1. Throughout his employment, Morris regularly worked in excess of 40 hours in a work week. Like all employees in the Covered Positions and Staff 1 through Senior 2 audit employees, he was *required* to work at least 55 hours per week during the busy season which continued from January through March annually, and, in fact, often worked significantly in excess of 55 hours per week. Morris did not receive additional compensation for the overtime hours worked.

41. Plaintiff McDaniel was an employee of Defendants commencing in October 2008, until April 2011. McDaniel became a licensed CPA in December 2010. Throughout her employment she was assigned to provide services on audit engagements. Initially, her job title was Staff 1. In or about September, 2009, she was "promoted" to Staff 2,

and in or about September 2010, she was "promoted" to Senior 1. Throughout her employment, McDaniel regularly worked in excess of 40 hours in a work week. Like all employees in the Covered Positions and Staff 1 through Senior 2 audit employees, she was *required* to work at least 55 hours per week during the busy season which continued from January through March annually, and, in fact, often worked significantly in excess of 55 hours per week. McDaniel did not receive additional compensation for the overtime hours worked.

42. Throughout their employment, Morris and McDaniel performed routine tasks under multiple layers of supervision. The work performed by Plaintiffs and the Classes was not executive, administrative or professional as those terms are defined by Federal and California laws.

43. The great majority of such work by Plaintiffs and members of the Classes included secretarial, clerical, data entry and support work, including filing papers, organizing and assembling documents, taking notes of meetings, entering data into spread sheets, schedules or forms, formatting spreadsheets, conforming data entered on journals, or subsidiary journals to original documents, adding numbers on journals, calculating percentages from numbers on financial statements on journals, and similar tasks. Such tasks require very little or no exercise of independent judgment or discretion, and such discretion or judgments as are exercised are not as to matters which are considered "material," the accounting industry's term for matters of significance. The tasks performed by Plaintiffs and members of the Classes do not require any advanced professional degree or license or the prior completion of any extended course of academic or technical studies in any art or science for the proper performance of these tasks. Limited classroom training and on-the-job

training supplied Plaintiffs and the members of the Classes with the skills necessary to perform their tasks.

44. Many of the tasks performed by members of the Classes were also performed by "interns" who had not completed their undergraduate degrees.

45. Defendants compensated the Plaintiffs and members of the Classes on a "salary only" basis whereby the Plaintiffs and the members of the Classes were paid a fixed salary for all hours worked during each week and no overtime.

46. Neither of the Plaintiffs, nor the other members of the FLSA Class or the California Class, were or are part of any group exempt from the overtime requirements of Federal Law or the Labor Laws of the States and jurisdictions of the United States, including, without limitation, the California Wage Law.

47. Members of the California Class are not "professionals" and did not perform executive or administrative functions as defined by the laws of California, or the FLSA or regulations of administrative interpretation thereof.

FIRST CLAIM FOR RELIEF
Restitution for Failure to Pay Overtime to the Federal Collective
(Violation of FLSA §207)

48. Plaintiffs hereby incorporate by reference all of the allegations of all prior paragraphs as though fully set forth herein.

49. Section 207(a)(1) of the FLSA provides, in pertinent part:

> Except as otherwise provided in this section, no employer shall employ any of his employees

> who in any workweek is engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. §207(a)(1) (2005).

50. Section 213(a)(1) of the FLSA provides that the overtime pay requirement does not apply to:

> any employee employed in a bona fide **executive, administrative, or professional capacity** (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary school), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of title 5 except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of his executive or administrative activities, if less than 40 per centuin of his hours worked in the work week are devoted to such activities).

29 U.S.C. §213(a)(1) (2005) (emphasis added).

51. The Section 213(a)(1) exemption for employees employed in a professional capacity is inapplicable because members of the Classes are not employed in a bona

fide "professional" capacity. The skills necessary to perform the tasks actually performed by Plaintiffs and the other members of the FLSA Collective are acquired through experience, on-the-job training apprenticeship, and limited classroom training at Ernst & Young, as well as through self-study, but not as a result of undergraduate or graduate accountancy training. To the extent that training in accounting terminology or double entry bookkeeping is useful for the performance of the jobs of members of the Classes, the necessary training and skills are those of an experienced bookkeeper.

52. The Section 213(a)(1) exemption for executive or administrative personnel also do not apply to members of the FLSA Collective.

53. For purposes of the FLSA, the employment practices of Defendants were and are uniform throughout the United States in all respects material to the claims asserted in this Complaint and the affirmative defenses applicable to these claims. Nationally circulated audit manuals and audit practices, policies, agendas and templates are prepared and circulated by Defendants and set forth the nationally applicable standard practices for the duties to be prepared by persons working on audits.

54. There are no other exemptions applicable to Plaintiffs and/or the other members of the FLSA Collective.

55. Plaintiffs and other members of the FLSA Collective, either regularly or from time to time, worked more than forty (40) hours per week for Defendants, and received no premium pay for hours worked in excess of forty (40) hours per week.

56. In committing the wrongful acts alleged to be in violation of the FLSA, Defendants acted willfully in that they knowingly, deliberately and intentionally failed to

pay overtime to Plaintiffs and the other members of the FLSA Collective.

57. As a result of Defendants' failure to pay overtime, Plaintiffs and the other members of the FLSA Collective were damaged in an amount to be proven at trial.

58. Therefore, Plaintiffs demand that they and the members of the FLSA Collective be paid overtime compensation as required by the FLSA for every hour of overtime worked in any work week for which they were not compensated, plus liquidated damages, and attorneys' fees as provided by law.

SECOND CLAIM FOR RELIEF
Restitution for Failure to Pay Overtime to the California Class
(California Labor Code Section 1194)

59. Plaintiffs hereby incorporate each and every allegation contained in this Complaint above and re-allege said allegations as though fully set forth herein.

60. At all relevant times, the Plaintiffs and the California Class members were required to work in excess of eight hours during the workday and in excess of forty (40) hours during the workweek and/or worked more than six consecutive days in a workweek.

61. During all relevant times the Wage Order No. 4 of the California Industrial Welfare Commission provided that "nonexempt employees must be paid an overtime premium for all hours worked in excess of eight during the workday and in excess of 40 during the workweek, as well as for work performed on the seventh workday in a work week."

62. Although the Plaintiffs and the California Class members worked overtime as that term was defined in the

relevant wage orders, Defendants failed and refused to pay the legally required state overtime premiums.

63. Therefore, Plaintiffs, on their own behalves and on behalf of all California Class members, demand overtime compensation as provided under California law, liquidated damages, and attorneys' fees.

THIRD CLAIM FOR RELIEF
Overtime and Unpaid Wages to the California Class
(California Labor Business and Professions Code "17200, et seq)

64. Plaintiffs hereby incorporate each and every allegation contained in this Complaint and re-allege said allegations as though fully set forth herein.

65. Throughout the above-described period, Defendants repeatedly misrepresented to the members of the Classes and the general public that the members of the Classes were "professional" or other sorts of employees exempt from the overtime laws of the State of California. The Defendants also failed to require or have the members of the Classes take specified paid and/or unpaid meal and rest breaks as required by California law and did not pay members of the Classes an hour of additional wages per day for such un-received break time, as required by California law.

66. The misrepresentations and omissions by the Defendants gave Defendants a competitive advantage over other employers who legitimately paid their workers the proper overtime wages and other wages required by California law and who also gave the employees the meal and rest breaks required by California law or the additional wages required by California law in lieu thereof.

67. Defendants' conduct described in this Complaint constitutes an unlawful business practice in violation of the provisions of Business and Professions Code "17200, *et seq.*

68. Therefore, Plaintiffs pray for restitution and injunctive relief for themselves and all California Class members for all wages due and an order pursuant to Business & Professions Code Section 17203 to cease from failing to pay overtime wages to workers employed or who render services to Defendants within California.

FOURTH CLAIM FOR RELIEF
Statutory Interest on Unpaid Wages to the California Class
(Labor Code Section 218.6)

69. Plaintiffs hereby incorporate each and every allegation contained in this Complaint above and re-allege said allegations as though fully set forth herein.

70. California Labor Code Section 218.6 state, "In any action brought for the nonpayment of wages, the court shall award interest on all due and unpaid wages at the rate of interest specified in subdivision (b) of Section 3289 of the Civil Code, which shall accrue from the date that the wages were due and payable as provided in Part 1 (commencing with Section 200) of Division 2."

71. Subdivision (b) of Section 3289 of the California Civil Code states, "If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach."

72. Therefore, Plaintiffs, on their own behalves and all California Class members', demand interest on the

amount of wages due weekly at the rate of 10% per annum as required by law.

FIFTH CLAIM FOR RELIEF
Waiting Penalties to the California Class
California Labor Code Section 203)

73. Plaintiffs hereby incorporate each and every allegation contained in this Complaint above and re-allege said allegations as though fully set forth herein.

74. California Labor Code Section 203 states, "If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.5, 202, and 205.5, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days."

75. The Plaintiffs and the majority of members of the Classes terminated employment more than 30 days prior to the filing of this lawsuit.

76. Therefore, Plaintiffs, on their own behalves and all California Class members', demand waiting penalties according to law.

SIXTH CLAIM FOR RELIEF
Unpaid Wages for Worked Break Time to the California Class
(California Labor Code Section 226.7)

77. Plaintiffs hereby incorporate each and every allegation contained in this Complaint above and re-allege said allegations as though fully set forth herein.

78. Pursuant to California Labor Code Section 226.7, and the wage orders issued pursuant to said statute, the Plaintiffs and the California Class members were entitled

to paid 10 minute breaks for every four hours of daily employment and an unpaid meal break of 30 minutes after five hours of daily employment.

79. Although the Plaintiffs and the California Class members regularly worked for amounts of time each day that would entitle them to the paid and unpaid rest and meal breaks provided for under California Labor Code Section 226.7, they often did not receive such daily rest and meal breaks, and they did not receive one hour of additional pay on the days they did not receive such breaks.

80. Therefore, Plaintiffs, on their own behalves and all California Class members', demand the payment of an additional one hour of pay for each day that they were not provided with the breaks required by California law.

WHEREFORE, Plaintiffs, on behalf of themselves and the other members of the FLSA Class and the California Class, demand judgment in their favor against Defendants, individually, jointly and severally, for:

A. Compensatory damages, including restitution for both regular and overtime compensation due Plaintiffs and the other members of the FLSA Class and the California Class during the applicable Federal Eligibility Period and the California Eligibility period, plus liquidated damages and interest thereon at the statutory rate;

B. An order temporarily, preliminarily, and permanently enjoining and restraining Defendants from engaging in similar unlawful conduct as set forth herein;

C. Imposition of a constructive trust upon the assets of the Defendants to the extent of the sums due to Plaintiffs and the other members of the FLSA Class and California Class;

D. The California Class demands premium pay for overtime hours worked according to the Wage Orders of the Industrial Welfare Commission applicable at the time work was performed, as well as one hour of additional wages for each day that they worked and were not provided with the breaks required by California law and waiting penalties as provided for under Labor Code Section 203;

E. The California Class also demands interest at the legal rate of 10% per annum, from each week payment of wages were due for each and every California Class member;

F. Reasonable attorneys' fees, litigation expenses and costs of suit;

G. Such other and further relief as the Court deems just and equitable.

Dated: April 10, 2012

FOLKENFLIK & MCGERITY

By: /s/ _____

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Policies and Practices Repository, United States
Employment Policies
E&Y Common Ground
Dispute Resolution Program

ERNST & YOUNG
Policy and Practice Statement
Ernst & Young LLP

SCORE No.	AA7521 Revision date of this Program Document April 2006. Common Ground Program originally adopted August 2002 (SCORE No. AA7520).
Effective Date	25-May-2006
Supersedes	AA7520
Distribution	Personnel
Issue Date	25-Apr-2006
Issuer(s)	Kathryn A. Oberly
Issuing Function(s)	General Counsel's Office

E&Y COMMON GROUND DISPUTE RESOLUTION PROGRAM

I. Preamble

The Common Ground Dispute Resolution Program, as outlined in this document (the "Program"), is intended to provide a fair, prompt, and cost-effective mechanism for resolving disputes. The Program is the sole method for resolving disputes within its coverage. It is not intended to limit or expand substantive rights that would otherwise be available under law.

II. Coverage of Program

A. Entities and persons covered.

1. "Firm" means Ernst & Young LLP and Ernst & Young U.S. LLP, all of their subsidiaries and affiliates, and any successor entities (together, the "Entities"). It also includes all partners, principals, agents and employees of the Entities against whom a claim is asserted for acts arising out of their duties for an Entity.

2. "Employee" means an applicant for employment or an employee of the Firm who is bound by the terms and conditions of the Program, and anyone else who may assert a claim belonging to, obtained from, or on behalf of that person. A person remains an Employee for purposes of the Program even if the person is not, or is no longer, employed by the Firm, unless the person becomes a partner or principal in the Firm. (Partners and principals are covered by a different dispute resolution program.) ***An Employee indicates his or her agreement to the Program and is bound by its terms and conditions by beginning or continuing employment with the Firm after May 25, 2006*** (the "Effective Date").

B. Disputes covered.

1. All claims, controversies or other disputes between the Firm and an Employee that could otherwise be resolved by a court, except as stated below ("Covered Disputes"), shall be resolved through the Program. Both the Firm and the Employee give up any right to resolve any Covered Dispute through any other means. ***Neither the Firm nor an Employee will be able to sue in court in connection with a Covered Dispute.***

2. The following types of claims are *not* Covered Disputes:

a. A claim for temporary, preliminary or interim injunctive relief relating to the period before the Arbitrator (as defined below) is selected, including temporary restraining orders or preliminary injunctions.

b. Statutory claims for workers' compensation or unemployment insurance.

c. A claim that is subject to a different dispute resolution program or an explicit exhaustion of remedy requirement (such as a claim relating to an employee benefit plan of the Firm, or a bonus, profit or gain sharing, or incentive compensation program of the Firm).

C. *Examples of types of disputes covered.* Examples of Covered Disputes include:

1. Claims based on federal statutes such as Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Fair Labor Standards Act, the Equal Pay Act, the Rehabilitation Act of 1973, the Family and Medical Leave Act, the Employee Retirement Income Security Act and the Worker Adjustment and Retraining Notification Act, all as have been or may be amended.

2. Claims based on state statutes and local ordinances, including state and local anti-discrimination laws.

3. Claims based on common law theories such as tort and contract.

4. Claims concerning wages, salary, and incentive compensation programs, except as provided in paragraph II. B. 2. above.

5. Claims concerning application, interpretation and enforcement of the Program.

These examples are not exclusive and are provided only as examples of some of the kinds of Covered Disputes that may exist. All Covered Disputes, whether or not listed here, must be resolved through the Program.

III. Phase I - Mediation

A. *Definition.* If a Covered Dispute arises, the parties will try to resolve the Covered Dispute through mediation as set forth below.

B. *Provider.* The Provider for Phase I shall be the Employee's choice of one of the following dispute resolution organizations:

1. The International Institute for Conflict Prevention and Resolution ("CPR"),

2. The American Arbitration Association ("AAA"), or

3. JAMS.

If the Employee does not choose a Provider within 10 days of Phase I being started, the Firm may choose the Provider.

C. *Initiation.* A party may start Phase I by giving the other party notice in writing. If contemplated by the mediation procedures of the Provider, the Firm will contact the Provider on behalf of the parties.

D. *Mediator.* The parties may agree on a mediator. If the parties do not agree, a party may request that a mediator be appointed by the Provider, but any mediator appointed

must be acceptable to each party. The mediator will help the parties attempt to resolve the Covered Dispute by agreement.

E. *Mediation Rules.* If the Provider is CPR or AAA, the relevant mediation rules or procedures of the Provider as in effect on the Effective Date will be used in conducting the mediation to the extent such rules are consistent with the Program. The rules may be viewed *here* (for CPR) and *here* (for AAA). If the Provider is JAMS, the mediation will be conducted as specified by the mediator and consistent with the Program.

F. *Attorney Representation.* An Employee may choose to be represented by a lawyer in the mediation, or may choose not to use a lawyer. If the Employee is not a law school graduate and elects not to be represented by a lawyer, the Firm will not use a lawyer.

G. *Fees and Expenses of Mediation.* An Employee starting Phase I will pay an amount equal to the fee that the Employee would pay to file a lawsuit asserting the same claim in the court of general jurisdiction in the county or independent city where the Employee's primary place of employment is or was located (the "Court Equivalent Fee") or the Employee's fee specified in the Mediation Rules, whichever is less. The Firm will pay any other fees and expenses charged by the Provider or the mediator. An Employee may contribute a greater portion if the Employee so chooses, up to half of the total.

H. *Attorney's Fees.* Each party shall be responsible for the party's own attorney's fees and related expenses.

I. *Termination of Phase I.* Phase I shall end after 90 days, whether or not the Covered Dispute has been resolved, unless the parties have agreed otherwise in writing.

IV. Phase II - Arbitration

A. *Definition.* If a Covered Dispute is not resolved in Phase I, either party may choose to proceed to binding arbitration, as provided below.

B. *Phase I Default.* If a party files a lawsuit relating to a Covered Dispute in court in violation of the terms of the Program, the other party may choose to proceed directly to Phase II or to seek an order requiring the party who filed the lawsuit to satisfy the requirements of the Program.

C. *Provider.* The Provider for Phase II shall be the Employee's choice of CPR, AAA, or JAMS. It need not be the same provider used in Phase I. If the Employee does not select a Provider within 10 days of Phase I being started, the Firm may choose the Provider.

D. *Arbitration Rules.* The arbitration will be conducted in accordance with the Program and the relevant arbitration rules of the Provider as in effect on the Effective Date ("Arbitration Rules"). The relevant rules may be viewed *here* (for CPR), *here* (AAA), and *here* (JAMS). If there is any conflict between the Arbitration Rules and the Program, the Program will take precedence.

E. *Initiation.*

1. A party may start Phase II by giving the other party notice in writing.

2. If the Arbitration Rules provide for the filing of a demand or request for arbitration with the Provider, the party starting Phase II shall file such demand or

request in accordance with the Arbitration Rules, and the arbitration shall not proceed until the Provider has notified the parties that it agrees to assist with the arbitration in accordance with the requirements of the Program. If the Provider does not so agree, an alternative Provider shall be selected by the party starting Phase II or, if no Provider is available, by application to the court of general jurisdiction in the county or independent city where the Employee's primary place of employment is or was located.

F. *Attorney Representation.* Either party may choose to be represented by a lawyer in the arbitration, or may choose not to use a lawyer.

G. *Number and Selection of Arbitrators.*

1. If the amount in controversy is $1 million or less, the arbitration will be conducted by one arbitrator. If the amount in controversy is more than $1 million, the arbitration shall be conducted by a panel of three arbitrators. In no circumstances shall a single arbitrator have power to make any award in excess of $1 million.

2. A single arbitrator shall be selected as provided in the Arbitration Rules. A three arbitrator panel shall be selected as follows: each party shall select one arbitrator and inform the Provider of the selection. The Provider will invite the party-selected arbitrators to serve without revealing which party had selected each arbitrator. Once appointed, the two party-selected arbitrators shall select the third arbitrator.

3. All party-appointed arbitrators and single arbitrators shall be selected from:

a. For AAA, the regional Employment Dispute Resolution Roster, or an equivalent list if such list is unavailable;

b. For CPR, the regional Employment Panel of Distinguished Neutrals, or an equivalent list if such list is unavailable; or

c. For JAMS, a list of at least ten potential arbitrators to be provided to the parties by the Provider.

4. No person may serve as an arbitrator unless that person has agreed in writing to be bound by the requirements of the Program.

5. The single arbitrator or the panel of three arbitrators, as the case may be, is referred to below as the "Arbitrator."

H. *Arbitrator Competence.* Any issue about whether a claim, controversy or dispute is subject to arbitration, or about how the terms and conditions of the Program should be interpreted or whether they are binding on the parties, will be decided by the Arbitrator.

I. *Venue.* The venue of the arbitration will be, and the hearing, if any, will be conducted in, the county or independent city where the Employee's primary place of employment is or was located, unless the parties agree otherwise.

J. *Law Applicable to Arbitration.* In deciding a Covered Dispute, the Arbitrator will apply the substantive law, including burdens of proof, that would be applied by a court in the venue of the arbitration. The Arbitrator may grant any relief that could be granted by such a court, but will have no power to grant any other relief.

K. *Separate Proceedings.* If there is more than one Covered Dispute between the Firm and an Employee, all such Covered Disputes may be heard in a single proceeding. Covered Disputes pertaining to different Employees will be heard in separate proceedings.

L. *Discovery.* Consistent with the expedited nature of arbitration and the needs of the parties, each party may obtain discovery relevant to the Covered Dispute as follows:

1. Each party may obtain reasonable discovery of documentary evidence.

2. Each party may also take the deposition of (i) three individuals of the party's choosing for no more than seven hours each, and (ii) the deposition of any expert witness designated by the other party.

3. The Arbitrator shall permit additional discovery upon a finding that a party requires it to adequately arbitrate a claim, but shall protect the parties against discovery that is unduly burdensome.

4. The Arbitrator will issue subpoenas to third parties for such documentary evidence on the reasonable request of a party, if permitted by law.

M. *Witnesses.* The parties shall exchange witness lists at least 10 days prior to any hearing. A party may not present a witness at a hearing if the name of the witness has not been provided to the opposing party in accordance with this rule.

N. *Summary Adjudication.* If, after giving the parties due opportunity to comment on the matter, the Arbitrator determines that all or part of a party's claim fails to state a legal claim, or that there is no genuine issue of fact as to all or part of a party's claim, the Arbitrator shall dismiss

the claim or relevant portion thereof, or grant summary judgment for any part thereon, as appropriate.

O. *Conduct of Hearing.* At an arbitration hearing, the parties shall have the right to present proof through testimony and documentary evidence, and to cross-examine witnesses who testify at the hearing.

P. *Fees and Expenses.* Fees and expenses of the arbitration will be handled as follows:

1. Filing and administrative fees. The Firm will pay all filing and administrative fees in connection with the arbitration, except as follows:

a. An Employee starting Phase II shall contribute the Court Equivalent Fee or the Employee's fee specified in the Arbitration Rules, whichever is less. An Employee who paid the Court Equivalent Fee in Phase I need not contribute when initiating Phase II.

b. An Employee may contribute a greater portion of filing and administrative fees if the Employee so chooses, up to half.

2. Arbitrator fees and other costs. The parties' intent is for Arbitrator fees and other costs of the arbitration, other than filing and administrative fees, to be shared equally to the extent permitted by law and the Arbitration Rules. However, the portion of the cost to be paid by an Employee will be adjusted to the extent, if any, necessary for the parties' agreement to arbitrate to be enforced.

3. Party attorney fees and other expenses. Each party will be responsible for the party's own attorney's fees and related expenses, but the Arbitrator will have authority to provide for reimbursement of

the Employee's attorney's fees, in whole or part, in accordance with applicable law or in the interest of justice.

Q. *Award.* The Arbitrator shall render an award and written opinion in the form typically rendered in labor arbitrations. The Arbitrator is expected to issue the award and opinion no later than thirty (30) days from the date the arbitration hearing concludes or post-hearing briefs (if requested) are received, whichever is later, but a failure of the Arbitrator to meet this or any other deadline shall not affect the validity of the arbitration and award. The opinion shall set forth the factual and legal basis for the award and shall include a summary of the issues, including the nature of the dispute, the relief requested and awarded, a statement of any other issues resolved, and a statement regarding the disposition of any statutory claims. An award shall be final and binding on the parties to the fullest extent permitted by law. Judgment on any award may be entered and enforced in any court of competent jurisdiction.

V. Other Matters

A. *Confidentiality.* All aspects of Phase I and Phase II, including any award made, shall be confidential, except to the extent disclosure is required by law or applicable professional standards, or is necessary in a later proceeding between the parties.

B. *At-Will Employment.* The Program does not change the at-will status of Employees and does not create any contract between an Employee and the Firm, other than as to those matters expressly addressed in the Program.

C. *Notice.* Any notice required to be given to an Employee shall be directed to the Employee's last known address as reflected in the records of the Firm. Any notice required to be given to the Firm shall be directed to the General Counsel's Office at the Firm's principal location in New York City, to the attention of Rita A. Hernandez, Deputy General Counsel, or her successor or designee.

D. *Administrative Process.*

1. The Program does not affect the right of any Employee to file a charge with, make a complaint to, or bring any matter to the attention of ("File a Charge") the U.S. Equal Employment Opportunity Commission, a state or local discrimination agency, or any other administrative body. However, if an Employee who has Filed a Charge relating to a Covered Dispute has not fully pursued the dispute through the Program, the Firm may ask the agency or body in question to defer its processing or investigation of the Charge until the Program has been completed.

2. Notwithstanding the Filing of a Charge, an Employee may seek monetary relief with respect to a Covered Dispute only through the Program.

E. *Termination or Amendment.*

1. The Firm may propose termination or amendment of the Program by providing notice to Employees through the Daily Connection or other electronic notice on at least two occasions. An Employee indicates his or her agreement to the proposed amendment or termination, and such proposed change becomes effective as to that Employee, by continuing his or her employment with the Firm for at least thirty days after the second notice is provided.

2. Termination or amendment will not affect a Covered Dispute as to which Phase I had been initiated when the termination or amendment was proposed.

3. If a proposed termination or amendment is determined not to be effective in whole or part for any reason, including lack of sufficient notice, lack of agreement, invalidity of a Program provision, or otherwise, the Program as it existed at the time of the proposed termination or amendment shall remain in effect to the extent that the proposed termination or amendment is determined not to be effective.

F. *Due Process and Severability.*

1. The Program is intended to be fair to both sides and to provide access by Employees at an affordable cost. If it is determined that all or part of the Program is unenforceable for reasons pertaining to the fairness of the procedures or the cost, the Firm shall have the option to modify the Program as appropriate to address the concern.

2. If any portion of the Program is held to be invalid or unenforceable, or if any portion of the Program would, if effective, violate applicable law, that portion of the program shall be void and of no effect, but the remainder of the Program shall remain in full force and effect.

G. *Choice of Law Governing Program.* The Program, these procedures, and any arbitration award that may result from them shall be governed by the Federal Arbitration Act and, to the extent, if any, that such Act is held not to apply, to the state law, including judicial interpretations, applicable in the State of New York, provided that principles of conflicts of laws shall not be applied.

RECORD
AND
BRIEFS

FILED
JUN - 9 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-300

In the Supreme Court of the United States

ERNST & YOUNG LLP, ET AL., PETITIONERS

v.

STEPHEN MORRIS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

REX S. HEINKE
GREGORY W. KNOPP
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QUESTION PRESENTED

Whether the collective-bargaining provisions of the National Labor Relations Act prohibit the enforcement under the Federal Arbitration Act of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Ernst & Young LLP and Ernst & Young U.S. LLP. Petitioners are limited liability partnerships. They have no parent corporations, and no publicly held companies own 10% or more of their stock.

Respondents are Stephen Morris and Kelly McDaniel.

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In the Supreme Court of the United States

No. 16-300

ERNST & YOUNG LLP, ET AL., PETITIONERS

v.

STEPHEN MORRIS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 834 F.3d 975. The order of the district court granting petitioners' motion to compel arbitration (Pet. App. 43a-67a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2016. The petition for a writ of certiorari was filed on September 8, 2016, and granted on January 13, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in relevant part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title[.]

STATEMENT

This case presents an extraordinarily important question concerning the enforceability of agreements requiring employees and employers to arbitrate claims against one another on an individual, rather than collective, basis. Under the Federal Arbitration Act, arbitration provisions "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. The question presented is whether the collective-bargaining provisions of the National Labor Relations Act prohibit the enforcement under the Arbitration Act of arbitration provisions of the type at issue here.

Petitioners are Ernst & Young LLP and Ernst & Young U.S. LLP (collectively "EY"). Virtually all of EY's approximately 40,000 employees in the United States have agreed to an arbitration provision as a condition of employment, requiring all disputes with petitioners to be resolved in individual arbitration. Respondents are two of petitioners' former employees. Despite the arbitration provisions in their employment agreements, respondents filed a class action against petitioners in federal court, asserting claims under the Fair Labor Standards Act and California law. Petitioners moved to compel arbitration, and the district court granted the motion, holding that the arbitration provision at issue was enforceable.

A divided panel of the Ninth Circuit reversed. Over a lengthy dissent, the majority held that the arbitration provision violated the collective-bargaining provisions of the National Labor Relations Act and was thus unenforceable under the Arbitration Act. In so holding, the Ninth Circuit specifically rejected the mode of analysis this Court has established for evaluating a potential conflict between the Arbitration Act and another federal

statute, under which the other federal statute must contain a clear congressional command to override the Arbitration Act's express mandate to enforce arbitration provisions according to their terms. The Ninth Circuit's decision was incorrect, and its judgment should be reversed.

A. Background

1. Arbitration is an alternative form of dispute resolution that offers many benefits over traditional litigation. Arbitration allows the parties to design their own "efficient, streamlined procedures tailored to the type of dispute" at issue. *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 344 (2011). It produces "expeditious results." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985). And it "reduc[es] the cost" of dispute resolution. *AT&T Mobility*, 563 U.S. at 345.

Despite those benefits, there was a long history of "judicial hostility" to arbitration. *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510-511 (1974). That hostility dates from the English common law, which "traditionally considered irrevocable arbitration agreements as 'ousting' the courts of jurisdiction, and refused to enforce such agreements for this reason." *Id.* at 510 n.4. Judicial hostility to arbitration was "firmly embedded" in English law and carried over into American law. H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924). It "manifested itself in a great variety of devices and formulas declaring arbitration against public policy." *AT&T Mobility*, 563 U.S. at 342 (internal quotation marks and citation omitted).

In 1925, Congress enacted the Federal Arbitration Act, 9 U.S.C. 1-16, to reverse the "old common-law hostility toward arbitration." *Southland Corp.* v. *Keating*,

465 U.S. 1, 14 (1984). In its primary substantive provision, Section 2, the Arbitration Act states that "[a] written provision in any * * * contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2.

As this Court has repeatedly recognized, the Arbitration Act reflects "both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility*, 563 U.S. at 339 (internal quotation marks and citation omitted). Consistent with that understanding and Section 2's express mandate, "courts must rigorously enforce arbitration agreements according to their terms." *American Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013) (internal quotation marks and citation omitted). That principle applies in the context of employment agreements. See *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 109 (2001). It applies in the context of agreements that require individual arbitration. See *AT&T Mobility*, 563 U.S. at 345-352. And it applies in the context of agreements to arbitrate federal statutory claims, unless "the [Arbitration Act's] mandate has been overridden by a contrary congressional command." *CompuCredit Corp.* v. *Greenwood*, 565 U.S. 95, 98 (2012) (internal quotation marks and citations omitted).

2. This case presents a question at the intersection of the foregoing contexts: namely, whether an arbitration provision in an employment agreement that requires an employee to arbitrate claims on an individual basis is valid and enforceable under the Arbitration Act. Arbitration of employment disputes has long been routine for unionized employees, and it has become increasingly

common for non-unionized employees over the last fifty years. See Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 Hofstra L. Rev. 83, 84 (1996).

The argument that arbitration provisions of the type at issue here are unenforceable relies on the National Labor Relations Act (NLRA). In enacting the NLRA in 1935, Congress found that "[t]he denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest." 29 U.S.C. 151. Accordingly, Congress sought to promote industrial peace by "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." *Ibid.*

Of relevance here, Section 7 of the NLRA provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. And Section 8(a) of the NLRA makes it an "unfair labor practice" for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" by Section 7. 29 U.S.C. 158(a). The NLRA does not contain any reference to class or other collective dispute-resolution procedures, whether in court or in arbitration.

B. Facts And Procedural History

1. Petitioner Ernst & Young LLP is an accounting firm serving clients in the United States; petitioner

Ernst & Young U.S. LLP is an affiliate of Ernst & Young LLP. Virtually all of EY's approximately 40,000 employees in the United States have consented to an arbitration provision as a condition of employment. The agreement between EY and those employees specifies that "[a]ll claims, controversies or other disputes between [petitioners] and an [e]mployee that could otherwise be resolved by a court" will instead be resolved through the Common Ground Dispute Resolution Program. J.A. 37.

The Common Ground Program is designed to "provide a fair, prompt, and cost-effective mechanism for resolving disputes" between EY and its employees. J.A. 36. The program has existed since 2002, with amendments not relevant here. *Ibid.* It expressly preserves an employee's right to file a charge with the Equal Employment Opportunity Commission or any other administrative agency. J.A. 47.

Under the Common Ground Program, dispute resolution proceeds in two phases. The first phase is mediation. To initiate mediation, the employee need only provide EY with notice in writing of a dispute and pay a fee equivalent to the fee for filing a lawsuit in a local court of general jurisdiction or the fee specified in the dispute-resolution provider's rules, whichever is less. EY pays the remaining fees and costs associated with the mediation. The employee then has the option of selecting among the available dispute-resolution providers to conduct the mediation. The employee is entitled to counsel in the mediation; if the employee chooses not to hire a lawyer (and is not himself a lawyer), EY will not use a lawyer either. If mediation does not resolve the dispute within 90 days, the process proceeds to the next phase unless the parties agree to an extension. J.A. 39-41.

The second phase of the Common Ground Program is binding arbitration. In that phase, "[c]overed [d]isputes pertaining to different [e]mployees will be heard in separate proceedings"; class or other collective proceedings are not permitted. The employee can initiate arbitration without paying an additional fee, and the employee again has the option of choosing the dispute-resolution provider and retaining counsel. EY pays the filing and administrative fees associated with the arbitration. The parties pay their own attorney's fees and split the arbitrator's fees and costs evenly, although EY will pay a larger portion of the arbitrator's fees and costs under certain circumstances. The arbitrator also has the authority to order EY to reimburse the employee's attorney's fees. J.A. 42, 44-46.

Both parties may take discovery, including "reasonable" document requests; three depositions of fact witnesses of each party's choosing; depositions of any expert witnesses designated by the other party; and additional discovery as necessary to ensure "adequate[]" arbitration of the claim. The arbitrator then holds a hearing in which the employee and EY present their cases through testimony and documentary evidence. The arbitrator's award is final and binding. J.A. 44-45.

2. Respondent Stephen Morris worked in the audit division of EY's Los Angeles, California, office from 2005 to 2007. Respondent Kelly McDaniel worked in the audit division of EY's San Jose, California, office from 2008 to 2011. During her tenure at EY, McDaniel became a licensed accountant. Both respondents agreed to resolve their employment-related disputes through the Common Ground Program. J.A. 17-18, 25-26; Pet. App. 45a.

3. In 2012, respondent Morris brought suit against petitioners in the United States District Court for the Southern District of New York on behalf of a nationwide

class of employees and a separate class of California employees, alleging that petitioners had misclassified the employees for purposes of overtime pay under the Fair Labor Standards Act (FLSA) and California law. Respondent McDaniel later joined the lawsuit as a named plaintiff. After the case was transferred to the Northern District of California, petitioners moved to compel arbitration. Respondents did not dispute that their claims were covered by the arbitration provision; they argued that the arbitration provision was unenforceable because, among other things, the collective-bargaining provisions of the NLRA conferred a nonwaivable right to collective litigation. J.A. 14; Pet. App. 45a, 50a.

The district court granted petitioners' motion to compel arbitration and dismissed the case. Pet. App. 43a-67a. As is relevant here, the court reasoned that it was required to "enforce the instant agreement according to its terms" because "Congress did not expressly provide [in the NLRA] that it was overriding any provision in the [Arbitration Act]," which embodies a "strong policy choice in favor of enforcing arbitration agreements." *Id.* at 66a-67a (first alteration in original) (internal quotation marks and citation omitted).

4. A divided panel of the court of appeals reversed and remanded. Pet. App. 1a-42a.

a. The court of appeals began its analysis by examining the NLRA. Pet. App. 3a-11a. Citing case law construing Section 7 of the NLRA, the court asserted that "Section 7 protects a range of concerted employee activity, including the right to seek to improve working conditions through resort to administrative and judicial forums." *Id.* at 7a (internal quotation marks and citation omitted). According to the court, Section 7 thus establishes a "substantive right" for employees "to pursue work-related legal claims, and to do so together." *Id.* at

8a, 10a. The employment agreements' arbitration provision, the court of appeals determined, "prevents concerted activity by employees in arbitration proceedings, and the requirement that employees only use arbitration prevents the initiation of concerted legal action anywhere else." *Id.* at 11a. As a result, the court reasoned, the provision "interfere[s] with a protected [Section] 7 right in violation of [Section] 8" of the NLRA and "cannot be enforced." *Ibid.*

Having not yet even mentioned the Arbitration Act, the court of appeals proceeded to dismiss it, stating that the Arbitration Act "does not dictate a contrary result." Pet. App. 12a. In the court's view, "[t]he illegality of the 'separate proceedings' term here has nothing to do with arbitration as a forum." *Id.* at 13a. Rather, "[i]rrespective of the forum in which disputes are resolved, employees must be able to act in the forum *together*." *Id.* at 23a. Relying on the Arbitration Act's saving clause, which provides that an arbitration agreement is enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. 2, the court concluded that petitioners' arbitration provision was prohibited by the NLRA and thus was unenforceable. Pet. App. 16a, 24a.

In reaching that conclusion, the court of appeals recognized that the majority of circuits to have considered the issue had reached the opposite conclusion. Pet. App. 24a n.16. The court of appeals specifically rejected the mode of analysis underlying those courts' logic, which would require a "contrary congressional command" in a federal statute in order to override the Arbitration Act's mandate to enforce arbitration agreements. *Id.* at 17a.

b. Judge Ikuta dissented. Pet. App. 25a-42a. In her view, the majority's reasoning was "directly contrary" to this Court's arbitration jurisprudence. *Id.* at 25a.

Judge Ikuta began by observing that, "[c]ontrary to the majority's focus on whether the NLRA confers 'substantive rights,' in every case considering a party's claim that a federal statute precludes enforcement of an arbitration agreement, the Supreme Court begins by considering whether the statute contains an express 'contrary congressional command' that overrides the [Arbitration Act]." Pet. App. 29a (citing *Italian Colors*, 133 S. Ct. at 2309; *CompuCredit*, 565 U.S. at 98; and *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)).

Under that test, Judge Ikuta reasoned, the NLRA contained nothing "remotely close" to a "contrary congressional command" that would displace the Arbitration Act's clear mandate to enforce arbitration agreements according to their terms. Pet. App. 35a. The collective-bargaining provisions of the NLRA "neither mention arbitration nor specify the right to take legal action at all, whether individually or collectively." *Ibid.* Nor do those provisions "expressly preserve any right for employees to use a specific *procedural* mechanism to litigate or arbitrate disputes collectively." *Id.* at 36a. In addition, Judge Ikuta found no support in the NLRA's legislative history or underlying purposes for the conclusion that the NLRA precludes enforcement of an agreement requiring disputes to be resolved in individual arbitration. *Id.* at 37a-38a.

Judge Ikuta proceeded to reject the majority's reliance on the Arbitration Act's saving clause. Pet. App. 38a-41a. At the outset, Judge Ikuta noted that this Court "does not apply the savings clause to federal statutes"; instead, unless the supposedly conflicting statute contains a congressional command contrary to the use of arbitration, it "can be harmonized with the [Arbitration Act]." *Id.* at 39a. She contended that the majority's reasoning was based on the erroneous premise that collec-

tive-action waivers are illegal, when in fact such a waiver "would be illegal only if it were precluded by a 'contrary congressional command' in the NLRA, and here there is no such command." *Id.* at 40a.

Judge Ikuta further reasoned that, even if the Arbitration Act's saving clause were applicable to federal statutes, it could not save the majority's construction of the NLRA as "giving employees a substantive, nonwaivable right to classwide actions." Pet. App. 40a. As she explained, such a purported right would "disproportionately and negatively impact arbitration agreements by requiring procedures that 'interfere[] with fundamental attributes of arbitration.'" *Ibid.* (alteration in original) (quoting *AT&T Mobility*, 563 U.S. at 344). In *AT&T Mobility*, she added, the Court "expressly rejected" the reasoning behind the majority's conclusion that "the nonwaivable right to class-wide procedures [that the majority] has discerned in [Section] 7" complies with the Arbitration Act simply because it "applies equally to arbitration and litigation." *Ibid.*

Judge Ikuta concluded by observing that the majority's rule was "directly contrary to Congress's goals in enacting the [Arbitration Act]." Pet. App. 40a. She noted that "lawyers are unlikely to arbitrate on behalf of individuals when they can represent a class, and an arbitrator cannot hear a class arbitration unless such a proceeding is explicitly provided for by agreement." *Id.* at 40a-41a (citation omitted). As a result, "the employee's purported nonwaivable right to class-wide procedures virtually guarantees that a broad swath of workplace claims will be litigated" rather than arbitrated. *Id.* at 41a. The majority, in other words, "exhibit[ed] the very hostility to arbitration that the [Arbitration Act] was passed to counteract." *Ibid.*

SUMMARY OF ARGUMENT

I. This case concerns an alleged conflict between the Federal Arbitration Act, which mandates that arbitration agreements be enforced according to their terms, and the National Labor Relations Act, which respondents contend prohibits individual-arbitration provisions such as the one contained in the agreement between respondents and EY. To avoid arbitration according to the terms of their agreement, respondents bear the burden of demonstrating that the NLRA contains a clear command contrary to the Arbitration Act's command to enforce arbitration agreements according to their terms. They cannot do so.

A. Section 2 of the Arbitration Act provides that "[a] written provision in any * * * contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. Consistent with that clear directive, courts must enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes.

When two federal statutes are allegedly in conflict, courts must harmonize the statutes if they are capable of coexistence, absent a clearly expressed congressional intention to the contrary. In the specific context of the Arbitration Act, the Court has distilled that principle into a rule that the Arbitration Act's clear command to enforce arbitration agreements according to their terms will yield only when it has been overridden by a contrary congressional command in another federal statute. The burden of proving that a federal statute displaces the Arbitration Act is heavy. In fact, that burden has not

been met in any case in which the statute in question does not expressly prohibit arbitration. In every such instance, this Court has rejected litigants' attempts to avoid arbitration by asserting that another federal statute displaces the Arbitration Act.

B. This case is no different. Respondents cannot carry their burden of showing that Congress intended in the NLRA to override the Arbitration Act by precluding agreements to arbitrate generally or agreements to arbitrate on an individual basis specifically. Nothing in the text of the NLRA demonstrates a congressional command contrary to agreements to arbitrate, much less agreements to arbitrate on an individual basis. Section 7 of the NLRA, which respondents invoke, contains no language about the availability of a judicial forum or collective dispute-resolution procedures in disputes between employers and employees. Nor does it refer to arbitration. Indeed, no provision anywhere in the NLRA guarantees a judicial forum or collective procedures for dispute resolution or disavows arbitration for resolving such disputes. Respondents rely on Section 7's residual clause, but its general language falls far short of the much more specific language in other statutes that this Court has held is still insufficient to demonstrate a congressional command contrary to the Arbitration Act.

The legislative history of the NLRA similarly lacks any indication of a congressional intent to preclude agreements to arbitrate generally or agreements to arbitrate on an individual basis specifically. To the extent there was discussion of arbitration in the legislative history of the NLRA, it was primarily in the context of a proposal to have the National Labor Relations Board *conduct* arbitrations. There was no discussion whatsoever of a right to pursue claims on a class or other collective basis against employers—which makes sense, given

that the NLRA was enacted decades before the adoption of the modern class-action mechanism in the Federal Rules of Civil Procedure and years before the adoption of the collective-action mechanism in the Fair Labor Standards Act.

Nor can the underlying purposes of the NLRA be said to be in inherent conflict with individual arbitration. The principal purpose of the NLRA is to minimize industrial strife by encouraging self-organization and collective bargaining. To the extent the NLRA protects employees' rights, it does so not for their own sake but rather to serve that purpose. Moreover, federal labor policy has long favored and promoted arbitration in the collective-bargaining process. This Court has observed that the advantages of arbitration, including the use of efficient procedures that reduce the cost and increase the speed of dispute resolution, may be of particular importance in employment litigation. Nothing suggests that the underlying purposes of the NLRA are irreconcilable with individual arbitration. Because the statute evinces no clear congressional intent to supersede the Arbitration Act, the arbitration provisions at issue here must be enforced according to their terms.

II. In holding that employment agreements requiring the parties to arbitrate on an individual basis are unenforceable, the court of appeals relied on erroneous interpretations both of the Arbitration Act's saving clause and of the NLRA.

A. The saving clause of the Arbitration Act permits courts to withhold enforcement of an arbitration agreement "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. That clause applies where a generally applicable doctrine of contract law—which, with rare exception, is supplied by state, not federal, law—prohibits the enforcement of an arbitration

agreement. The saving clause thus "saves" generally applicable state-law contract defenses such as fraud, but not defenses that discriminate against or apply only to arbitration. By its terms, the saving clause does not apply where another *federal* statute allegedly discriminates against arbitration. And for good reason. Unlike the States, Congress is entitled to enact laws discriminating against arbitration; no "saving" is necessary. That explains why this Court has never relied on the saving clause to resolve an alleged conflict between the Arbitration Act and another federal statute.

The court of appeals attempted to circumvent the foregoing logic by invoking the generally applicable "illegality" defense recognized at common law in most States. The court reasoned that the NLRA confers a nonwaivable substantive right to invoke collective-litigation procedures, making it "illegal" to enforce a contract that waives the right and thereby triggering the saving clause. That reasoning does not withstand scrutiny. For purposes of an "illegality" defense, the relevant public policy is that of the State. State public policy does not automatically embody federal public policy, and a State need not adopt federal public policy as its own. And if a State adopted a public policy of prohibiting agreements that require employees to arbitrate claims on an individual basis, that state law would be preempted by the Arbitration Act.

If the court of appeals were correct that state-law "illegality" defenses incorporate the policies of every federal statute, a litigant could circumvent the requirement of a clear congressional command simply by asserting that it would be "illegal" to enforce a contract that contravenes a federal statute. Such an approach would turn the saving clause against the Arbitration Act itself and would eviscerate the framework established by this

Court for analyzing conflicts between the Arbitration Act and other federal statutes.

B. Even if the saving clause applied, there is no nonwaivable substantive right to collective-litigation procedures at issue here. As an initial matter, this case does not involve any substantive rights under the NLRA. The rights respondents seek to vindicate arise under the Fair Labor Standards Act and California state law, and respondents can fully vindicate those rights in individual arbitration.

Respondents assert, however, that the NLRA confers on employees a right to invoke class or other collective procedures in litigating their non-NLRA rights. To state the obvious, the right to class or other collective procedures is a procedural right, not a substantive one. And a right to collective procedures can be waived.

In any event, the court of appeals erred in construing the NLRA to confer a nonwaivable right to invoke class or other collective procedures in dispute resolution between employees and employers. Both the text of Section 7, which guarantees a right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," and its context counsel against that interpretation. As for the text, "concerted activities" do not include activities in which an individual acts alone, such as an opt-out class action. And this litigation does not concern "mutual" rights, but rather employees' individual causes of action under the FLSA and California law. As for the context, the clause upon which respondents rely is a residual clause that must be construed in a manner consistent with the more specific words preceding it. That context demonstrates that the residual clause protects concerted activities such as the enumerated activities of self-organization and collective bargaining; it does not reach into the courtroom

to protect particular procedures by which non-NLRA claims are adjudicated.

Even if Section 7 did confer a right to invoke class or other collective procedures, that right would be waivable. Employers and employees are free to negotiate terms limiting the methods by which employees exercise their collectively bargained rights. Rights that are not central to the collective-bargaining process are not absolute and can be waived in a collective-bargaining agreement. Any right to invoke class or other collective procedures for dispute resolution falls in the category of waivable rights. And where no union exists, employees are not precluded from waiving their own procedural rights. That conclusion is consistent with the presumption that an individual may waive legal protections intended for his or her benefit, absent an affirmative indication by Congress to the contrary.

C. Finally, the NLRB is not entitled to deference regarding the interplay between the Arbitration Act and the NLRA. This case does not present a question concerning the best interpretation of Section 7 when arbitration is not at issue, but rather a question concerning the reconciliation of the Arbitration Act and the NLRA. The NLRB does not administer the Arbitration Act. Nor can it supply, by virtue of its interpretation of the NLRA, the contrary *congressional* command necessary to override the Arbitration Act. The question whether such a congressional command exists is one for this Court to answer. Because there is no irreconcilable conflict between the Arbitration Act and the NLRA, the Arbitration Act's mandate that arbitration provisions are to be enforced according to their terms should be given effect, and the agreements at issue here enforced.

ARGUMENT

I. EMPLOYMENT AGREEMENTS REQUIRING THE PARTIES TO ARBITRATE ON AN INDIVIDUAL BASIS ARE ENFORCEABLE UNDER THE FEDERAL ARBITRATION ACT

This case involves an alleged conflict between the Federal Arbitration Act and another federal statute. The Court has faced similar conflicts many times before, and it has consistently held that the Arbitration Act applies unless the other federal statute contains a "congressional command" "contrary" to arbitration according to the terms of the parties' agreement. Such a command must be "clearly" observable in the statute's text, legislative history, or underlying purposes that inherently conflict with arbitration.

To avoid arbitration according to the terms of their agreement with petitioners, therefore, respondents must demonstrate that the National Labor Relations Act is irreconcilable with the Arbitration Act because the NLRA contains a clear command that is contrary to the Arbitration Act's command to enforce arbitration agreements according to their terms. They cannot make that showing; indeed, in holding that the arbitration provision at issue was unenforceable, the Ninth Circuit did not even try. Nothing in the NLRA's text, legislative history, or purposes clearly evinces a congressional intent to preclude arbitration generally or to preclude individual arbitration specifically. Respondents' arbitration provision is therefore enforceable under the Arbitration Act. The Ninth Circuit erred in concluding otherwise, and its judgment should be reversed.

A. A Federal Statute Cannot Override The Arbitration Act's Clear Command To Enforce Arbitration Agreements According To Their Terms Unless It Contains A Clear Contrary Command

1. As this Court has repeatedly noted, the Arbitration Act embodies a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). Section 2 of the Arbitration Act provides that "[a] written provision in any * * * contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2.

Section 2 "reflects the fundamental principle that arbitration is a matter of contract." *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 67 (2010). Consistent with that principle, "courts must rigorously enforce arbitration agreements according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted." *American Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013) (internal quotation marks, citations, and brackets omitted).

"Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command." *Shearson/American Express Inc.* v. *McMahon*, 482 U.S. 220, 226 (1987). When two federal statutes allegedly conflict, "it is the duty of the courts, absent a clearly expressed congressional intention to the contrary," to harmonize the statutes if they are "capable of co-existence." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974); see *United States* v. *Estate of Romani*, 523 U.S.

517, 530-532 (1998). A merely "plausible" conflict between the statutes will not suffice to prevent harmonization. *American Bank & Trust Co.* v. *Dallas County*, 463 U.S. 855, 868-869 (1983).

Only when the two statutes are in "irreconcilable conflict" or when the later-enacted statute "covers the whole subject of the earlier one and is clearly intended as a substitute" will courts find that one statute impliedly repeals another. *Branch* v. *Smith*, 538 U.S. 254, 273 (2003) (plurality opinion) (internal quotation marks and citation omitted). And because "it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change," *United States* v. *Fausto*, 484 U.S. 439, 453 (1988), "repeals by implication are not favored." *Branch*, 538 U.S. at 273 (internal quotation marks and citation omitted).

In the specific context of the Arbitration Act, this Court has synthesized those principles into a rule that the Arbitration Act's clear command to enforce arbitration provisions according to their terms will yield only when it has been "overridden by a contrary congressional command" in another federal statute. *CompuCredit Corp.* v. *Greenwood*, 565 U.S. 95, 98 (2012) (internal quotation marks and citation omitted). The party resisting enforcement of an arbitration provision bears the burden of showing that "Congress intended to preclude a waiver of a judicial forum" or the other terms waived in the agreement. *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). Congress must demonstrate such an intention with "clarity." *CompuCredit*, 565 U.S. at 103. And consistent with that standard, "any doubts * * * should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25; see *CompuCredit*, 565 U.S. at 109 (Sotomayor, J., concurring in the judgment).

2. As this Court's decisions demonstrate, the burden of proving that a federal statute displaces the Arbitration Act is a heavy one. Indeed, where the statute in question does not expressly prohibit arbitration, the Court has uniformly rejected litigants' attempts to invoke another federal statute to displace the Arbitration Act. See, *e.g.*, *Italian Colors*, 133 S. Ct. at 2309-2312 (Sherman Act); *CompuCredit*, 565 U.S. at 99-105 (Credit Repair Organizations Act); *Green Tree Financial Corp.* v. *Randolph*, 531 U.S. 79, 90-92 (2000) (Truth in Lending Act); *Gilmer*, 500 U.S. at 26-33 (Age Discrimination in Employment Act); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 480-484 (1989) (Securities Act of 1933, overruling *Wilko* v. *Swan*, 346 U.S. 427 (1953)); *McMahon*, 482 U.S. at 227-242 (Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628-639 (1985) (Sherman Act); *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510-521 (1974) (Securities Exchange Act of 1934).

a. Three of the Court's decisions are particularly instructive. To begin with, take the decision in *CompuCredit*. The plaintiffs there filed a putative class action against their credit-card issuer under the Credit Repair Organizations Act (CROA), 15 U.S.C. 1679-1679j, and the issuer moved to compel arbitration in accordance with the plaintiffs' credit-card agreements. See 565 U.S. at 96-97.

In response, the plaintiffs argued that the CROA prohibited the arbitration of claims arising under its provisions. See 565 U.S. at 98-103. To support that view, the plaintiffs pointed to three of the CROA's provisions. One of the statute's provisions required credit-card issuers to include the following statement in contracts with

their customers: "You have a right to sue a credit repair organization that violates the [CROA]." 15 U.S.C. 1679c(a). A second provision, setting out the CROA's civil cause of action, specifically and repeatedly used the terms "court," "action," and "class action," arguably suggesting that the "right to sue" described in the first provision includes a right to bring a civil action in court. 15 U.S.C. 1679g. And a third provision stated that "[a]ny waiver by any consumer of any [of the CROA's] protection[s]" was "void" and "may not be enforced." 15 U.S.C. 1679f(a).

This Court nevertheless held that the CROA did not contain the requisite congressional command and thus did not prohibit the arbitration of claims arising under its provisions. See *CompuCredit*, 565 U.S. at 103-104. The Court noted that the CROA was "silent" on arbitration and that nothing in the CROA created a "right to bring an action *in a court of law*." *Id.* at 99, 104 (emphasis added). Instead, the Court reasoned, the provisions the plaintiffs cited simply demonstrated that the CROA provided a "*guarantee of the legal power to impose liability*." *Id.* at 102.

If Congress meant to prohibit the arbitration of claims under the CROA, the Court continued, "it would have done so in a manner less obtuse than what [the plaintiffs] suggest[ed]." 565 U.S. at 103. Citing the following examples, the Court noted that, when Congress has "restricted the use of arbitration," it has done so with a "clarity that far exceeds the claimed indications in the CROA":

> "No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section."

> "Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy."

Id. at 103-104 (quoting 7 U.S.C. 26(n)(2) and 15 U.S.C. 1226(a)(2)). Because the CROA lacked that clarity, the Court held that it did not override the Arbitration Act and the arbitration provisions at issue were thus valid and enforceable. *Id.* at 104; see also *id.* at 108 (Sotomayor, J., concurring in the judgment) (agreeing that Congress did not "evince[] a contrary intent" in the CROA against enforcement of arbitration agreements).

b. The Court's decision in *McMahon* is to the same effect. Of particular relevance here, the Court addressed whether the civil-liability provision in the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961-1968, precluded the arbitration of claims arising under that statute. That provision stated that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains." 18 U.S.C. 1964(c).

Although the civil-liability provision specifically provided that an injured party may sue in court, the Court held that the provision did not "even arguably evince[] congressional intent to exclude civil RICO claims from the dictates of the Arbitration Act." *McMahon*, 482 U.S. at 238. The Court added that there was no "hint in the[] legislative debates" to that effect, nor was there any "irreconcilable conflict" between the purposes of RICO's

civil-liability provision and the Arbitration Act. *Id.* at 238-239. To the contrary, the purpose of the civil-liability provision was "remedial," and arbitration would "adequately serve th[at] purpose[]." *Id.* at 240, 241.

c. Finally, consider the Court's decision in *Gilmer*. There, the plaintiff conceded that neither the text nor the legislative history of the statute at issue, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621-634, contained the requisite congressional command. See 500 U.S. at 26. Accordingly, the Court analyzed only whether the ADEA's "framework and purposes" conflicted with arbitration. *Id.* at 26-27.

In conducting its analysis, the Court accepted that the ADEA was designed to "further important social policies," whereas "arbitration focuses on specific disputes between the parties involved." 500 U.S. at 27. But the Court rejected the notion that the bilateral nature of arbitration created an "inherent inconsistency" with any statute designed to promote broader social goals. *Ibid.* Accordingly, the Court held that the Arbitration Act mandated enforcement of the arbitration provision—which contained a waiver of access to a collective-action mechanism identical to the one at issue here under the FLSA. See *id.* at 35.

d. Together, those decisions, and others like them, demonstrate that a party seeking to avoid arbitration based on a conflict between the Arbitration Act and another federal statute must show that Congress clearly intended for the other statute to displace the Arbitration Act. See *Mitsubishi Motors*, 473 U.S. at 628-640. It is not enough that a statute could be construed as conflicting with the Arbitration Act. See *CompuCredit*, 565 U.S. at 98-102; *McMahon*, 482 U.S. at 238-239. Nor will the Arbitration Act yield simply because the competing stat-

ute seeks to further a broad social policy. See *Gilmer*, 500 U.S. at 27.

Instead, only when a statute "evinces" a clear "congressional intent to exclude" the class of claims at issue "from the dictates of the Arbitration Act" will the Arbitration Act be displaced. *McMahon*, 482 U.S. at 238. Absent such a clear expression of intent, courts must give effect to the Arbitration Act's unambiguous mandate to enforce arbitration provisions according to their terms. See, *e.g.*, *CompuCredit*, 565 U.S. at 104.

B. The NLRA Does Not Contain A Clear Contrary Command To Override The Arbitration Act

Respondents agreed to arbitrate all employment disputes with EY on an individual, rather than collective, basis. They now maintain that EY cannot enforce the arbitration provision because the NLRA guarantees them a nonwaivable right to pursue collective litigation. In other words, respondents allege a conflict between the Arbitration Act, which requires enforcement of arbitration provisions according to their terms, and the NLRA.

Accordingly, respondents bear the burden of showing a clear contrary command in "the text of the [NLRA], its legislative history, or an inherent conflict between [individual] arbitration and the [NLRA's] underlying purposes." *Gilmer*, 500 U.S. at 26 (internal quotation marks and citation omitted). Because respondents cannot show that Congress intended in the NLRA to preclude agreements to arbitrate generally or agreements to arbitrate on an individual basis specifically, there is no irreconcilable conflict between the statutes, and the parties' agreement must be enforced.

1. Nothing in the text of the NLRA evinces a congressional command contrary to agreements to arbi-

trate, much less agreements to arbitrate on an individual basis. The key section respondents invoke, Section 7, provides in relevant part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. That provision contains no language guaranteeing the availability of a judicial forum in disputes between employers and employees. Nor does it contain any reference to class or other collective dispute-resolution procedures. And it does not even refer to arbitration.

Indeed, no provision in the entire NLRA guarantees the availability of a judicial forum or collective dispute-resolution procedures in disputes between employers and employees. Nor does the NLRA mention arbitration at all, aside from acknowledging that an employee may request that his union "use the grievance-arbitration procedure on the employee's behalf." 29 U.S.C. 169.

In particular, respondents rely on Section 7's residual clause, which gives employees the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. But the general language of that residual clause does not come close to doing the "heavy lifting" required to evince a clear intent to preclude individual arbitration. *CompuCredit*, 565 U.S. at 100. The clause is most naturally understood to be of a piece with the list of specific rights that it follows. That list, in turn, concerns self-organization and collective bargaining. See 29 U.S.C. 157. "Where general words follow specific words in a statutory enumeration, the general words are usually construed to embrace only objects similar in nature to those objects enumerated by the preceding specific

words." *Yates* v. *United States*, 135 S. Ct. 1074, 1086 (2015) (brackets omitted).

Even if it were "plausible" to read the broad language of the residual clause as encompassing a right for employees to pursue individualized employment claims collectively, that would not be enough. See *American Bank & Trust Co.*, 463 U.S. at 868-873. It would mean only that Section 7 is ambiguous on the relevant point. And it should go without saying that an ambiguous statute cannot provide the requisite clear congressional command to displace the Arbitration Act. In any event, ambiguous statutes should be "construe[d] * * * to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law"—not to create statutory conflicts when alternative interpretations are available. *West Virginia University Hospitals, Inc.* v. *Casey*, 499 U.S. 83, 100 (1991).

In fact, this Court has addressed much clearer language than Section 7's and found no contrary congressional command. Although the CROA contains an express right to file suit in federal court, this Court held in *CompuCredit* that the statute was insufficient to "establish the contrary congressional command overriding the [Arbitration Act]." 565 U.S. at 100-101 (internal quotation marks and citation omitted). Similarly, in *Gilmer*, the Court "had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the Age Discrimination in Employment Act, expressly permitted collective actions." *Italian Colors*, 133 S. Ct. at 2311 (discussing *Gilmer*). Section 7 does not contain anything close to the express language used in the CROA or the ADEA, and it thus falls far short of providing the clear command necessary to supersede the Arbitration Act.

2. The legislative history of the NLRA also does not evince a congressional intent to preclude agreements to arbitrate, much less agreements to arbitrate on an individual basis. To the extent there was discussion of arbitration in the legislative history of the NLRA, it was primarily in the context of a proposal to have the NLRB *conduct* arbitrations. See S. 1958, 74th Cong., 1st Sess. § 12 (introduced Feb. 21, 1935). There was no "discuss[ion] [of] the right to file class or consolidated claims against employers" at all. *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344, 361 (5th Cir. 2013). That is hardly surprising, since the NLRA was enacted decades before Federal Rule of Civil Procedure 23, which created the modern class action, see Pet. App. 37a, and years before the FLSA, which contains its own collective-action mechanism, see 29 U.S.C. 216(b).

There is thus no indication that, when Congress enacted the NLRA, it was concerned about protecting the ability to invoke class or other collective procedures when pursuing claims arising under other statutes. The silence of the legislative history further confirms that Congress did not intend in the NLRA to override the Arbitration Act's command to enforce arbitration provisions according to their terms.

3. In addition, individual arbitration does not inherently conflict with the underlying purposes of the NLRA such that a congressional intent to displace the Arbitration Act might be inferred. The stated purpose of the NLRA was to minimize industrial strife by "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. 151.

Consistent with that statutory purpose, the clear focus of the NLRA is on collective bargaining. Provisions of the NLRA create a right to self-organization, 29 U.S.C. 157; set limits on employers' and unions' behavior, 29 U.S.C. 158; and estab. sh a government agency intended to oversee relations between employers and unions, 29 U.S.C. 153, 160. As the Court has observed, to the extent the NLRA protects employees' rights, it does so "not for their own sake but as an instrument of the national labor policy" of "encouraging the practice and procedure of collective bargaining." *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50, 62 (1975).

The NLRA is hardly hostile to arbitration, moreover, as federal labor policy has long favored and promoted arbitration in the collective-bargaining process, as this Court has recognized for decades (including in cases where it was the employer that resisted arbitration). See, *e.g.*, *Nolde Bros.* v. *Bakery Workers*, 430 U.S. 243, 254-255 (1977); *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 439 (1967); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). The Court has repeatedly construed the NLRA to permit arbitration and to require enforcement of arbitration provisions in the context of collective-bargaining agreements. See, *e.g.*, *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 257-258 (2009); *Nolde Bros.*, 430 U.S. at 253-255.

Nor is the NLRA's policy of promoting collective bargaining at odds with the concept of *individual* arbitration. Although individual arbitration "focuses on specific disputes between the parties involved," it "nevertheless also can further broader social purposes." *Gilmer*, 500 U.S. at 27-28. Accordingly, while this Court has considered numerous statutes "designed to advance important public policies," it has consistently held that

"claims under those statutes are appropriate for arbitration." *Id.* at 28.

So too here. In upholding the validity of arbitration provisions in employment agreements, this Court has rejected the proposition that "the advantages of the arbitration process somehow disappear when transferred to the employment context." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 123 (2001). Those now-familiar advantages include the use of "efficient, streamlined procedures" that "reduc[e] the cost and increas[e] the speed of dispute resolution." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 344, 345 (2011). If anything, those advantages may be "of particular importance" in the context of employment litigation, which "often involves smaller sums of money than disputes concerning commercial contracts," *Circuit City*, 532 U.S. at 123.

Regardless of the existence of an arbitration provision, moreover, the NLRB retains the authority to issue a complaint against an employer that engages in unfair labor practices and to prosecute that complaint or to facilitate a settlement between the parties. See NLRB, *What We Do—Investigate Charges* <tinyurl.com/nlrb-charges> (last visited June 9, 2017). The arbitration provision at issue here also preserves an employee's right to file a charge with the Equal Employment Opportunity Commission or any other administrative agency. J.A. 47.

Put simply, nothing suggests that the underlying purposes of the NLRA are irreconcilable with individual arbitration. Indeed, it is difficult to fathom how there could be an *inherent* conflict between the purposes of the NLRA and individual arbitration when the procedures the NLRA allegedly protects—class actions under Rule 23 and collective actions under the FLSA—did not even exist when the NLRA was enacted. See p. 29, *supra*.

Arbitration has been, and continues to be, a common feature of federal labor relations under the NLRA. There is no valid reason to believe that individual arbitration gives rise to an inherent conflict with the purposes of the NLRA so as to supersede the Arbitration Act's clear mandate to enforce arbitration provisions according to their terms.

* * * * *

The burden is on respondents to show that Congress intended in the NLRA to supersede the Arbitration Act, and they cannot carry it. Neither the text, legislative history, nor the underlying purposes of the NLRA reveal anything even approaching a clear congressional command precluding agreements to arbitrate generally or agreements to arbitrate on an individual basis specifically. Pursuant to the Arbitration Act, therefore, the arbitration provision at issue here should be enforced. The court of appeals' contrary holding was erroneous.

II. NOTHING IN THE ARBITRATION ACT'S SAVING CLAUSE OR THE NLRA DICTATES A DIFFERENT CONCLUSION

The few courts of appeals to have held that employment agreements requiring the parties to arbitrate on an individual basis are unenforceable have relied on a misreading both of the Arbitration Act's saving clause and of the NLRA itself. The saving clause permits courts to withhold enforcement of an arbitration agreement "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. According to the court of appeals here, any attempt to waive collective-litigation procedures was illegal under Section 7 of the NLRA and thus unenforceable under the saving clause. See Pet. App. 14a.

That reasoning is deeply flawed. The Arbitration Act's saving clause applies to generally applicable doctrines of contract law (mainly state contract law). It has no purchase where, as here, the claim is that another federal statute supersedes the Arbitration Act. And even if it were otherwise, the NLRA does not confer a nonwaivable substantive right to invoke class or other collective procedures. The court of appeals reached the wrong result, and it did so by employing the wrong methodology. Its judgment should be reversed.

A. The Arbitration Act's Saving Clause Does Not Apply Where Another Federal Statute Is Alleged To Prohibit Or Limit Arbitration

1. Section 2 of the Arbitration Act provides that an arbitration provision shall be valid or enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. By its terms, the saving clause refers to "grounds * * * for the revocation of any contract": that is, to generally applicable doctrines of contract law. See *Kindred Nursing Centers Limited Partnership* v. *Clark*, 137 S. Ct. 1421, 1426 (2017). With rare exception, the substance of contract law is supplied by state law, rather than federal law. See *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938). Accordingly, this Court has described the saving clause as a "choice-of-law" provision for "choosing between state-law principles [of contract law] and the principles of federal * * * law envisioned by [the Arbitration Act]." *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987).

As the Court has explained, the saving clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mo-*

bility, 563 U.S. at 339 (quoting *Doctor's Associates, Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996)); see also *Southland Corp.* v. *Keating*, 465 U.S. 1, 16 n.11 (1984) (rejecting application of the saving clause to a law that did not provide a ground for "revocation of *any* contract," but rather only of contracts pertaining to a certain subject). A doctrine of state law that applies equally to "any contract" will therefore be "saved" by the saving clause, but a state law that discriminates against arbitration will be preempted because it conflicts with the substantive provisions of the Arbitration Act. See *Perry*, 482 U.S. at 491-492 & n.9; *Kindred Nursing*, 137 S. Ct. at 1426 (explaining that the saving clause "preempts any state rule discriminating * * * against arbitration").

By its terms, therefore, the saving clause does not apply where another federal statute allegedly discriminates against arbitration. Unlike the States, Congress is free to enact laws that discriminate against arbitration. When it does so, however, it is governed by the principles discussed above: Congress must clearly evince its intent to displace the Arbitration Act's command to enforce arbitration provisions according to their terms. Not surprisingly, in articulating that standard time and again, this Court has never suggested that the saving clause has any bearing on the analysis. See, *e.g.*, *CompuCredit*, 565 U.S. at 99-105; *Gilmer*, 500 U.S. at 26-33; *McMahon*, 482 U.S. at 227-242.

2. The court of appeals attempted to circumvent the foregoing reasoning in a manner reminiscent of the "great variety" of "devices and formulas" "declaring arbitration against public policy" that prompted the enactment of the Arbitration Act in the first place. *AT&T Mobility*, 563 U.S. at 342 (internal quotation marks and citation omitted). The court noted that the common law of most States provides a generally applicable "illegality"

defense that precludes the enforcement of contracts that violate public policy. Pet. App. 14a; see, *e.g.*, *Paperworkers* v. *Misco, Inc.*, 484 U.S. 29, 42 (1987). If the NLRA confers a nonwaivable substantive right to invoke class or other collective procedures, the court reasoned, it would be "illegal" to enforce a contract that waives that right, and the saving clause would therefore be triggered. Pet. App. 11a, 14a.

That argument is unavailing. To begin with, when assessing an "illegality" defense to contract enforcement under state law, the relevant public policy is that of the *State*. See, *e.g.*, *Vidal* v. *Girard's Executors*, 43 U.S. (2 How.) 127, 197 (1844). "It is for the [S]tate to say whether a contract * * * is so offensive to its view of public welfare as to require its courts to close their doors to its enforcement." *Griffin* v. *McCoach*, 313 U.S. 498, 507 (1941). Accordingly, in cases arising under diversity jurisdiction, federal courts typically analyze state public policy, not federal policy, when illegality defenses are raised. See 5 Richard A. Lord, *Williston on Contracts* § 12:1, at 755-756 & nn.20-21 (4th ed. 2009) (compiling cases). While state public policy may mirror federal policy, it does not automatically embody it; a State is free to pursue its own public-policy goals, subject only to preemption by conflicting federal law. And if the relevant *State* adopted a public policy of prohibiting agreements that require employees to arbitrate claims on an individual basis, that state law would be preempted by the Arbitration Act. See, *e.g.*, *AT&T Mobility*, 563 U.S. at 343-344.

A contrary understanding would circumvent the inapplicability of the saving clause to other federal statutes and would gut the ordinarily applicable framework for analyzing conflicts between two federal statutes. As discussed above, "it is the duty of the courts" to harmonize

two statutes alleged to be in conflict if they are "capable of co-existence." *Morton*, 417 U.S. at 551; see *Estate of Romani*, 523 U.S. at 530-532. In the absence of "a clearly expressed congressional intention" for one statute to supersede another, therefore, courts will find an implied repeal only when the two statutes are in "irreconcilable conflict" or when the later-enacted statute "covers the whole subject of the earlier one and is clearly intended as a substitute." *Branch*, 538 U.S. at 273 (internal quotation marks and citation omitted). That is why the Court has adopted and repeatedly applied a rule that the Arbitration Act's command to enforce arbitration provisions according to their terms will yield only when it has been "overridden by a contrary congressional command" in another federal statute. *CompuCredit*, 565 U.S. at 98 (internal quotation marks and citation omitted).

But if the Ninth Circuit were correct about state-law "illegality" defenses, a party could always circumvent the requirement of a clear congressional command by repackaging an allegation that another federal statute conflicts with the Arbitration Act as an allegation that it would be "illegal" (and thus impermissible under the saving clause) to enforce a contract that contravenes the other statute. That cannot be what Congress intended when it included the saving clause in the Arbitration Act. Cf. *Kindred Nursing*, 137 S. Ct. at 1428 (rejecting an interpretation of the Arbitration Act that "would make it trivially easy * * * to undermine the Act"); *AT&T Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 228 (1998) (reasoning, when interpreting a saving clause, that "the act cannot be held to destroy itself" (internal quotation marks and citation omitted)).

* * * * *

In short, the Arbitration Act's saving clause has no bearing on the correct analysis here. Because the NLRA does not contain a clear congressional command precluding agreements to arbitrate generally or agreements to arbitrate on an individual basis specifically, the parties' agreement must be enforced according to its terms. That is all the Court need decide in order to resolve the question presented. As we will now explain, however, it would be erroneous to conclude, even without reference to the requirement of a clear congressional command, that the NLRA confers a nonwaivable substantive right to invoke class or other collective procedures.

B. The NLRA Does Not Create A Nonwaivable Substantive Right To Collective-Litigation Procedures

The court of appeals concluded that the arbitration provision at issue here was "illegal" because it waived respondents' "substantive" rights under the NLRA. See Pet. App. 14a-15a. Specifically, the court construed the NLRA to confer a nonwaivable substantive right on employees to invoke class or other collective procedures in dispute resolution with their employers, whether in court or in arbitration. See *id.* at 16a-17a. That is incorrect. Accordingly, even if the saving clause applied here—and it does not—the judgment of the court of appeals should be reversed.

1. a. As a threshold matter, no substantive rights under the NLRA are at issue here. The substantive rights respondents seek to vindicate are asserted rights to back pay under the Fair Labor Standards Act and California state law. See J.A. 27-34. Respondents in no way waived *those* rights when they agreed to submit those claims to individual arbitration. Indeed, this Court

has expressly distinguished between "employees' substantive right[s]" and "the procedures available under [Section 7] for securing these rights," cautioning that the two should not be "confuse[d]." *Emporium Capwell*, 420 U.S. at 69.

In addition, respondents no longer argue that the arbitration provision at issue here somehow prevents them from *effectively* vindicating their underlying rights (which this Court has suggested, though never held, could lead to the invalidation of an arbitration provision). See *Italian Colors*, 133 S. Ct. at 2310; *Mitsubishi Motors*, 473 U.S. at 637 & n.19; see generally *Italian Colors*, 133 S. Ct. at 2313, 2315 (Kagan, J., dissenting) (suggesting that the effective-vindication doctrine applies when an arbitration provision "operates to confer immunity from potentially meritorious federal claims" by "foreclos[ing] (not diminish[ing]) a plaintiff's opportunity to gain relief for a statutory violation"). The arbitration provision at issue does not foreclose respondents in any way from gaining relief for the alleged statutory violations; it merely requires that the relief be sought in individual arbitration.

b. Respondents nevertheless claim that another statute—the NLRA—confers a right on employees to invoke class or other collective *procedures*. But as the last sentence reflects, that is the very definition of a procedural right, not a substantive one. After all, "[a] class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits." *Shady Grove Orthopedic Associates, P.A.* v. *Allstate Insurance Co.*, 559 U.S. 393, 408 (2010) (plurality opinion). "And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Ibid.*

Thus, while Federal Rule of Civil Procedure 23 provides a "right" to class litigation if certain prerequisites are met, see, *e.g.*, *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591, 613-616 (1997), the right "is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326, 332 (1980). That explains why Rule 23 satisfies the Rules Enabling Act and need not yield to conflicting state law under *Erie*. See *Shady Grove*, 559 U.S. at 406-410 (plurality opinion); *id.* at 429-436 (Stevens, J., concurring in the judgment). It also explains why a party can waive access to class procedures under Rule 23 in an arbitration provision, even if doing so renders some claims economically irrational to pursue. See *Italian Colors*, 133 S. Ct. at 2309, 2311.

The same analysis applies to other types of collective litigation, such as the "opt-in" collective-action mechanism of the FLSA. See 29 U.S.C. 216(b). Indeed, the ADEA expressly incorporates that collective-action mechanism, see 29 U.S.C. 626(b), and this Court has held that access to that mechanism can be waived in an arbitration provision without in any way suggesting that the right to invoke that mechanism is a substantive one. See *Gilmer*, 500 U.S. at 32; cf. *Italian Colors*, 133 S. Ct. at 2311 (discussing *Gilmer*).

Contrary to the court of appeals' reasoning, therefore, the fact that a statute confers a right to invoke class or other collective procedures indicates the existence only of a procedural right, which can be waived. See Pet. App. 15a. Such statutory rights "provide[] an opportunity to proceed collectively, not an invitation to plaintiffs that they could not refuse." *Nicholson* v. *CPC International Inc.*, 877 F.2d 221, 241 (3d Cir. 1989) (Becker, J., dissenting) (internal quotation marks and citation omitted); see *Gilmer*, 500 U.S. at 32 (citing Judge Becker's

opinion in *Nicholson* with approval). Because a waiver of the right to invoke collective-litigation procedures "merely limits arbitration to the two contracting parties" and does not "eliminate[] those parties' right to pursue their statutory remedy," *Italian Colors*, 133 S. Ct. at 2311, it is not somehow inherently invalid under the Arbitration Act. Conversely, under the Arbitration Act, parties have broad discretion to structure the procedures by which they may resolve their disputes—including whether to permit class arbitration. See *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 559 U.S. 662, 683-684 (2010). The procedural nature of the right at issue resolves the matter.

2. To the extent that the court of appeals construed the NLRA to confer a nonwaivable right on employees to invoke class or other collective procedures in dispute resolution with their employers, see Pet. App. 16a-17a, it was mistaken. It bears repeating that the correct inquiry here is whether the NLRA contains a *clear command* precluding agreements to arbitrate on an individual basis—and, for the reasons discussed above, it plainly does not. See pp. 26-32. In any event, the NLRA does not confer a right to invoke class or other collective procedures; even if it did, there is no reason to believe that it renders any such right nonwaivable.

a. To reiterate, Section 7 of the NLRA provides in relevant part that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. That language does not specifically confer any right on employees to pursue actions against their employers in court, nor does it say anything about class or other collective proce-

dures—much less does it elevate those procedures to the status of a nonwaivable substantive right. And even without the requirement of a clear command, there is no valid justification for concluding that the general right to engage in "concerted activities for * * * mutual aid or protection" encompasses the "right to resolve disputes using a particular legal procedure." Pet. App. 37a (Ikuta, J., dissenting).

In fact, the text and context of Section 7 decisively counsel against such a conclusion. As to the text: the NLRB has long recognized that "concerted activities" do not include activities in which an individual acts alone, even when that individual's activity is directed toward an issue of general interest to other employees. See *NLRB* v. *City Disposal Systems Inc.*, 465 U.S. 822, 829 n.6 (1984) (citing *Meyers Industries, Inc.*, 268 N.L.R.B. 493 (1984)). A class action (or other type of collective action) may be initiated by an individual employee, and it may be litigated without the involvement of any other employee. See 16-307 Pet. App. 148a (Member Johnson, dissenting). Indeed, at least as to an opt-out class action, the very point of the procedure is to allow an individual to represent absent parties *without* their participation.

Employees, moreover, cannot agree on their own to use class or other collective dispute-resolution procedures. Instead, the judge (or arbitrator) must determine that the employees satisfy the prerequisites of the relevant rule. A plaintiff cannot proceed as a class representative unless the judge finds that the plaintiff has satisfied the requirements of Rule 23, and an FLSA case does not qualify as a "collective action" unless the judge finds that all employees are "similarly situated." 29 U.S.C. 216(b). Even basic joinder requires a determination that the claims being joined arose out of the same transaction. See Fed. R. Civ. P. 20(a). "It would make

little sense for the 'concertedness' of a litigation campaign to turn on judicial decisions over which workers have no control." *NLRB* v. *Alternative Entertainment, Inc.*, No. 16-1385, 2017 WL 2297620, at *15 (6th Cir. May 26, 2017) (Sutton, J., concurring in part and dissenting in part).

But even if collective litigation did constitute "concerted activity," it would not constitute a "concerted activit[y] for * * * mutual aid or protection." This case well illustrates the point. Respondents are not pursuing "mutual" rights in any sense of the term. Instead, they are pursuing individual causes of action under the FLSA and California state law, seeking overtime pay to which they claim they are individually entitled.

While other EY employees may (or may not) be similarly situated, therefore, each respondent (and each purported class member) possesses his or her own cause of action under federal or state law, seeking his or her own individualized damages, even if those causes of action can be considered together in a single lawsuit through a collective-litigation mechanism. Again, there is no indication that, when Congress enacted the NLRA, it was concerned about protecting the ability to invoke class or other collective procedures when raising individualized employment claims arising under other statutes—especially because the procedures at issue in cases such as this one did not even exist at the time the NLRA was enacted. See p. 29, *supra*.

As to the context: the residual clause at issue here follows Section 7's core guarantees of the rights to organize and to engage in collective bargaining. As discussed above, familiar canons of construction dictate that the catch-all category of "other concerted activities for * * * mutual aid or protection" encompasses only ac-

tivities similar to the more specific guarantees that precede it. See pp. 27-28.

When considered in context, it is clear that Section 7's residual clause does not reach into the courtroom and "create an affirmative right to use or pursue [particular] procedures" to resolve an employee's claim against an employer. *Alternative Entertainment*, 2017 WL 229-7620, at *15 (Sutton, J., concurring in part and dissenting in part). While "mutual aid or protection" may be "somewhat broader" than the "narrower" protections for "self-organization" and "collective bargaining," *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565 (1978), collective-litigation procedures are still further removed. They do not go to the participatory rights at the heart of the NLRA or the underlying substantive rights over which the NLRA allows employers and employees to bargain. Instead, they merely provide the procedures by which disputes concerning those underlying rights are resolved. For that reason, employers and employees are free (whether through collective bargaining or otherwise) to negotiate terms such as whether employment disputes will be resolved through arbitration or litigation, or whether such disputes will be resolved individually or collectively.

However the residual clause may expand on Section 7's protection for the substantive self-organization and collective-bargaining rights of employees, therefore, it does not protect or prohibit particular procedures by which non-NLRA claims are adjudicated. See *Alternative Entertainment*, 2017 WL 2297620, at *15 (Sutton, J., concurring in part and dissenting in part) (noting that "the 'concertedness' of litigation does not turn on the particular procedural form that litigation takes"). Such a purpose would be entirely beyond, and indeed unlike, the rights protected by the remainder of Section 7. In fact,

the NLRA nowhere contemplates collective-litigation procedures as essential to its purposes—nor could it have, given that collective-litigation procedures of the type at issue here did not even exist at the time the NLRA was enacted. There is simply no indication that Section 7 confers on employees a right to invoke class or other collective procedures in dispute resolution with their employers.

In support of its construction of Section 7, the court of appeals cited this Court's decision in *Eastex* for the proposition that Section 7 protects the "right to 'seek to improve working conditions through resort to administrative and judicial forums.'" Pet. App. 7a (quoting 437 U.S. at 566). But *Eastex* cannot bear the weight the Ninth Circuit put on it. There, the Court expressly declined to address the question of "what may constitute 'concerted' activities in this context" (*i.e.*, in the context of litigation). 437 U.S. at 566 n.15; see Pet. App. 36a n.5 (Ikuta, J., dissenting).

Instead, the questions presented in *Eastex* were (1) whether distribution of a union newspaper was an activity protected by the NLRA and, (2) if so, how the fact that the distribution was to take place on the employer's property affected the analysis. See 437 U.S. at 563. The Court did not consider whether the NLRA confers a right to litigate against employers as a class; if it exists, when that right may be waived; or how the NLRA interacts with other federal statutes such as the Arbitration Act.

Nor would *Eastex* resolve the issue even if the Court had squarely held that Section 7 protects employees' rights to seek judicial relief in concert. That Section 7 might protect employees from adverse employment action after *filing* a lawsuit does not mean that it reaches into the courthouse and dictates how the litigation must

proceed. Indeed, the NLRB's General Counsel drew exactly that distinction in a 2010 guidance memorandum clarifying that an employer does not run afoul of Section 7 by moving to "enforce[]" the employee's agreement to arbitrate employment claims on an individual basis. See NLRB, General Counsel Mem. No. 10-06, at 2, 5-6 (June 16, 2010). Neither *Easter* nor any other decision of this Court speaks to the question whether Section 7 confers a right to proceed on a class or other collective basis once in court.

b. In any event, even if Section 7 did confer such a right, it would be waivable. As this Court has explained, "[t]he fact that an activity is concerted * * * does not necessarily mean that an employee can engage in the activity with impunity." *City Disposal Systems*, 465 U.S. at 837. Instead, "if an employer does not wish to tolerate certain methods by which employees invoke their collectively bargained rights, he is free to negotiate a provision in his collective-bargaining agreement that limits the availability of such methods." *Ibid.*

Thus, this Court has held that rights that are not central to the collective-bargaining process are not absolute and can be waived by unions on behalf of their members. For example, the Court and the NLRB have upheld a union's waiver of the right of its members to use particular methods, such as the right to engage in an economic strike, the right to picket, and even, in some circumstances, the right to ongoing collective bargaining through a "zipper" clause. See, *e.g.*, *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 705-707 (1983); *Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 105-106 (1962); *NLRB* v. *Rockaway News Supply Co.*, 345 U.S. 71, 79-80 (1953); *GTE Automatic Electric Inc.*, 261 N.L.R.B. 1491, 1491-1492 (1982).

Even assuming that Section 7 conferred a right to invoke class or other collective procedures, therefore, that right would be waivable. It would be anomalous for the NLRA to protect against waiver of a right to collective-litigation procedures for non-NLRA claims when the NLRA allows for waiver of rights as significant as the rights to strike and to picket in order to enforce collectively bargained rights. And because the alleged right at issue here has nothing to do with the terms of a collective-bargaining agreement, there is nothing odd about the notion that an individual, as opposed to only a union representative, would be able to waive that right.

Indeed, where, as here, no union has been formed, it would make no sense to preclude individual employees from waiving their procedural rights for themselves. Cf. *14 Penn Plaza*, 556 U.S. at 258 (noting that "[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative"); 29 U.S.C. 157 (giving employees "the right to refrain" from bargaining through a representative). Accordingly, employers and employees remain free to negotiate whether employment disputes will be resolved through arbitration or litigation, or whether such disputes will be resolved individually or collectively.

The principle that any right to invoke class or other collective procedures may be waived is consistent with the broader background principle that parties have a presumptive right to waive legal protections intended for their benefit. See *United States* v. *Mezzanatto*, 513 U.S. 196, 200-201 (1995). That presumption applies regardless of the source of the protections at issue—whether the Constitution, a statute, or the common law. See *ibid*; *Shutte* v. *Thompson*, 82 U.S. (15 Wall.) 151, 159 (1873). Relying on that presumption, the Court has permitted

the waiver of a wide variety of individual rights in both the civil and criminal contexts. See, *e.g.*, *Evans* v. *Jeff D.*, 475 U.S. 717, 730-732 (1986) (right to attorney's fees in Section 1983 actions); *Kearney* v. *Case*, 79 U.S. (12 Wall.) 275, 281 (1871) (Seventh Amendment right to jury trial); *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969) (Fifth Amendment privilege against compulsory self-incrimination, Sixth Amendment right to jury trial, and Sixth Amendment right to confront one's accusers); *Johnson* v. *Zerbst*, 304 U.S. 458, 465 (1938) (Sixth Amendment right to counsel).

To be sure, the presumption in favor of waiver will yield if waiver is "inconsistent with the provision creating the right sought to be secured." *New York* v. *Hill*, 528 U.S. 110, 116 (2000). But in the statutory context, that generally requires some "affirmative indication of Congress' intent to preclude waiver." *Mezzanatto*, 513 U.S. at 201. The NLRA contains no such indication, either generally or with regard to any (unenumerated) right to invoke collective-litigation procedures specifically. Cf. 15 U.S.C. 1679f(a) (CROA provision explicitly prohibiting "[a]ny waiver by any consumer of any protection" provided by the statute). Quite to the contrary, holding that Section 7 precludes an employee from waiving class proceedings would "create[] a bizarre alchemy," because "[i]t would mean that Section 7 guarantees an employee the right to pursue a collective action" that the underlying statute (here, the FLSA) permits to be waived. *Alternative Entertainment*, 2017 WL 2297620, at *16 (Sutton, J., concurring in part and dissenting in part).

In sum, the NLRA does not confer a nonwaivable substantive right on employees to invoke class or other collective procedures in dispute resolution with their employers. And in any event, because the NLRA does

not contain a *clear command* to preclude agreements to arbitrate on an individual basis, and because enforcement of the arbitration provision at issue will not interfere with the vindication of respondents' underlying substantive rights, that provision should be enforced according to its terms under the Arbitration Act. See, *e.g.*, *CompuCredit*, 565 U.S. at 102; *Italian Colors*, 133 S. Ct. at 2318 (Kagan, J., dissenting).

C. The NLRB Is Not Entitled To Deference On The Interplay Between The Arbitration Act And The NLRA

Finally, the NLRB is not entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in its assessment of how the provisions of the NLRA should be reconciled with the Arbitration Act. See Pet. App. 5a.

1. As a preliminary matter, the relevant inquiry here is not whether the NLRA can be construed *in vacuo* to confer a nonwaivable right to invoke class or other collective procedures, but rather how the Arbitration Act and the NLRA can be reconciled. The NLRB does not administer the Arbitration Act, and this Court has "never deferred to the [NLRB's] remedial preferences" when it comes to "federal statutes and policies unrelated to the NLRA." *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 144 (2002).

In the specific context of the Arbitration Act, moreover, this Court has made clear that the Arbitration Act's command to enforce arbitration provisions according to their terms will yield only when it has been "overridden by a contrary *congressional* command" in another federal statute. *CompuCredit*, 565 U.S. at 98 (emphasis added) (internal quotation marks and citation omitted). The NLRB cannot supply the requisite clear "congressional command" by construing a purportedly ambiguous

statute. It is the Court's task to determine whether such a "congressional command" exists, and to resolve the interplay between the two statutes. In other words, once a potential conflict between the Arbitration Act and another federal statute has been identified, "the presumption against implied repeals sets in, and *Chevron* leaves the stage." *Alternative Entertainment*, 2017 WL 2297620, at *17 (Sutton, J., concurring in part and dissenting in part).

2. In any event, the NLRB's position that the NLRA confers a nonwaivable right to invoke class or other collective procedures is of only recent vintage. As noted above, see p. 45, the General Counsel issued a guidance memorandum in 2010 advising that an employer does *not* violate the NLRA by requiring "non-NLRA employment claims [to] be resolved" through individual arbitration, as long as employees can "challenge [arbitration] agreements through concerted activity" and "only individual rights are waived." NLRB, General Counsel Mem. No. 10-06, *supra*, at 2.

The NLRB abruptly reversed course in *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012). The NLRB began its analysis by noting that it had interpreted Section 7's protection of "concerted action" as encompassing some forms of collective litigation. *Id.* at 2278. The NLRB then proceeded to diverge from the guidance memorandum by concluding that, because Section 7 created a substantive right to engage in collective employment litigation, *any* attempt to waive that right would violate public policy and would thus be unenforceable under the Arbitration Act's saving clause. See *id.* at 2285-2288. And the NLRB went further in *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (2014), when it stated that the "broad language of Section 7" constituted a congressional command contrary to individual arbitration. *Id.* at 9.

3. Even on its own terms, the NLRB's analysis suffers from a host of flaws, and it would not warrant deference even if deference were due. Section 7 unambiguously does not create a nonwaivable right to class or other collective procedures in employment-related disputes. See pp. 40-48, *supra*. But even if Section 7 were ambiguous, that is of no moment. This case does not present a question concerning the best interpretation of Section 7 when arbitration is not at issue. Instead, it presents the question whether Section 7 contains the requisite "congressional command" prohibiting or limiting arbitration. However it is construed by an agency, an ambiguous statute cannot provide the "clarity" necessary to override the Arbitration Act, because the statute and the Arbitration Act must be reconciled on their own terms. *CompuCredit*, 565 U.S. at 103; see pp. 48-49, *supra*.

Section 7 does not compel the conclusion that employees have a nonwaivable right to class or other collective procedures in employment-related disputes. And under the established principles this Court applies in cases involving claimed conflicts between the Arbitration Act and another federal statute, that is the end of the analysis. Because there is no irreconcilable conflict between the Arbitration Act and the NLRA, the Arbitration Act's mandate that arbitration provisions are to be enforced according to their terms should be given effect. The arbitration provision at issue here is valid, and the judgment of the court of appeals should therefore be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

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ERNST & YOUNG LLP and ERNST & YOUNG U.S. LLP,

Petitioners,

—v.—

STEPHEN MORRIS and KELLY MCDANIEL,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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COUNTER-STATEMENT OF QUESTION PRESENTED

1. Whether Sections 7 and 8(a)(1) of the National Labor Relations Act, 28. U.S.C. §§ 157, 158, which establish a statutory right for employees to "engage in***other concerted activities for the purpose of ***mutual aid or protection," render unlawful a term of an arbitration agreement that requires arbitration of an employee's work-related disputes to be conducted individually and in "separate proceedings."

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INTRODUCTION

For well over a century, employers have sought to use employment contracts as a device to prohibit or otherwise limit the ability of employees to band together to address their employment grievances collectively. The employers in these cases similarly seek to use contracts with individual employees to deny those employees the right to address illegal underpayment of their wages collectively.

This time, because the employers' case is premised on the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*, the employers praise the advantages of arbitration. They seek to portray their contracts barring collective litigation as a "benefit" of "particular importance" to employees citing allegedly lower costs and allegedly faster resolution. That is hardly universally true. It not true in this case.

Petitioner Ernst & Young's arbitration process is so complex that the expense dwarfs the generally small amount of unlawfully withheld overtime payments. In *Sutherland v. Ernst & Young LLP*, uncontested evidence showed the potential cost was $200,000; the potential recovery was only $1,867.02. Judge Kimba Wood of the United States District Court for the Southern District of New York found: "Only a 'lunatic or a fanatic' would undertake such an endeavor" individually. *Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547, 552 (S.D.N.Y. 2011), *rev'd*, 726 F. 3d 290 (2d Cir. 2013).

The only case we are aware of where arbitration was individually pursued against Ernst & Young is the currently pending *Richards v. Ernst & Young, LLP*, AAA 01 15 0003 6796, pursued by counsel for Respondents here, under protest, with reservation of

all rights. That arbitration is currently stayed pending the result of this appeal.

***

The Norris-LaGuardia Act ("Norris-LaGuardia"), 29 U.S.C. § 101, *et seq.* and the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq.*, guarantee employees a ***right to pursue*** overtime claims ***collectively.*** Those laws ***do not*** guarantee collective litigation will be successful, or even economically viable. Yet, collective litigation to enforce statutory overtime rights is often viable and sustainable as both this case and *Epic Systems Corp. v. Lewis,* No. 16-285 ("*Epic*"), demonstrate.

The importance of the protection of the right to pursue "concerted activities" for the purpose of "mutual aid or protection" is powerfully illustrated by the decade long history of litigation by employees of Ernst & Young seeking to enforce their statutory overtime rights under the Fair Labor Standards Act ("FLSA") and state law.

Epic Petitioners note that Congress gave employees the right to pursue employment disputes through "concerted activities" to "increase[ ] [employees'] bargaining power and thereby increase[ ] the possibility of fair outcomes" in employment disputes. *Epic* Br. 43. We agree. The right to pursue collective judicial action does increase the possibility of fair outcomes, just as Congress intended.

STATEMENT

Six months after first being sued in a class action under state law, *see Ho v. Ernst & Young LLP*, Case No., 05-cv-04867-RMW (N.D. Cal.), Ernst & Young adopted the arbitration agreement at issue. Pet. 45a. The agreement required individual arbitration of all

employment disputes and barred collective or class proceedings. Ernst & Young required employees to agree to the arbitration agreement as a condition of initial or continued employment. Pet. 45a. Ernst & Young has resisted collective and class actions by its employees seeking unlawfully withheld overtime payments on the basis of that arbitration agreement.

Stephen Morris ("Morris") commenced this action against Ernst & Young seeking overtime payments that he alleged were required to be paid under the terms of Section 7(a)(1) of the FLSA. 29 U.S.C. § 207(a)(1). Morris sought to proceed as a collective action under Section 16(b) of that statute. 29 U.S.C. § 216(b). J.A. 27-28. He also sought relief under California Labor Code Section 1194 (Deering), which has its own overtime payment requirements, and other related relief under state law. With respect to the state law claims, Morris proceeded under Rule 23 of the Federal Rules of Civil Procedure. The Complaint was amended to include Kelly McDaniel ("McDaniel" and collectively with Morris "Respondents") as an additional collective and representative plaintiff. Ernst & Young moved to compel each of the Respondents to arbitrate individually.

A. The History of This Court's Recognition of Congressional Protection for Concerted Action by Employees.

During the beginning of the 19th Century, employers persuaded this Court that their right to freedom of contract overcame statutory limitations on legislation limiting the hours an employee could work. *Lochner v. New York*, 198 U.S. 45 (1905). "Employers required [employees] to sign agreements stating that the workers were not and would not become labor union

members," referred to as "yellow dog contracts." *Lincoln Fed. Labor Union v. Nw. Iron & Metal Co.*, 335 U.S. 525, 534 (1949). Both Congress and state legislatures passed laws outlawing such agreements. For a time, both state and federal laws against "yellow dog contracts" were struck down by this Court based on a "constitutional doctrine also used to strike down laws fixing minimum wages and maximum hours in employment. . . ." *Id.* at 535. *See also, Adair v. United States*, 208 U.S. 161 (1908); *Coppage v. Kansas*, 236 U.S. 1 (1915). In 1932 Norris-LaGuardia outlawed "yellow dog contracts" and established, as public policy of the United States, protection of employees' right to engage in "other concerted activities" for the purpose of "mutual aid or protection."

Shortly thereafter, the 74th Congress enacted Section 7 of the 1935 NLRA making clear that employees have "the right" to "engage in" "other concerted activities for *** mutual aid or protection" and making "interfere[nce]" with the exercise of that right illegal. 29 U.S.C. §§ 157, 158(a). "Other concerted activities" includes and protects concerted action in judicial forums. Without exception, each of the seven circuit courts to have ruled on that issue over the years has found that to be the plain meaning of "other concerted activities".

Norris-LaGuardia also ***expressly repealed*** "[a]ll acts or parts of acts" in "conflict" with its "public policy" protecting the "right" of employees to engage in "other concerted activities *** for their mutual aid or protection." 29 U.S.C. §§ 102, 115.

Following passage of the NLRA, the next session of Congress passed the FLSA, 52 Stat. 1060, 29 U.S.C. § 201 *et seq.*, perhaps the signature legislation of the New Deal. The FLSA set forth employment rules concerning minimum wages, maximum hours, and

overtime pay. It expressly provided for a right of employees to sue collectively to enforce the wage, hour and overtime pay rules. 29 U.S.C. § 16(b).

The *Lochner, Adair, Coppage* line of authority has been decisively rejected by this Court. *See Fed. Labor Union v. Nw. Iron & Metal Co.*, 335 U.S. at 536. Since that time both the National Labor Relations Board ("NLRB") and this Court have repeatedly and consistently resisted any attempt by employers to contractually dictate any limitation on the right of "employees to band together in confronting an employer regarding the terms and conditions of their employment." *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 835 (1984); s*ee also, infra* at 15-17. In these consolidated cases, the employers seek to use individual employment contracts to effectively overturn nearly a century of Supreme Court authority.

B. The Arbitration Agreement

As a condition of McDaniel's initial employment and Morris' continued employment, both were required to agree to an arbitration agreement entitled "Ernst & Young's Common Ground Dispute Resolution Program," (the "EY Arbitration Agreement"). J.A. 36-48. The EY Arbitration Agreement bars all court proceedings, as well as proceedings in arbitration as a class or collective action. § II.B.1, J.A. 37. Employees are allowed to participate in administrative proceedings, but they are not allowed to obtain any monetary awards in those proceedings. § V.D.2, J.A. 47.

The EY Arbitration Agreement imposes a mandatory multi-phased process, adding to the cost and delaying the outcome. Phase I requires mediation. §§ III and III.G, J.A. 39-40. Phase II is arbitration, either before the International Institution for Conflict

Prevention and Resolution ("CPR"), American Arbitration Association, or J.A.MS, as the employee chooses. § IV and IV.C., J.A. 41-48.

The chosen provider must agree to comply by the terms of the EY Arbitration Agreement. § IV.G.4 , J.A. 43. If there is any conflict between the provider's arbitration rules and terms of the EY Arbitration Agreement, the EY Arbitration Agreement "will take precedence." § IV.D., J.A .41.

Discovery is required. It is expansive and expensive, including "reasonable" documentary discovery, at least six depositions of fact witnesses (three for each side for seven hours each), and depositions of expert witnesses. § IV.L., J.A. 44. There is a right to move for summary adjudication. § IV.N., J.A. 44-45. Finally, there is a full evidentiary hearing. § IV.O., J.A. 45.

The EY Arbitration Agreement provides confidentiality for "all aspects of the proceeding." As a result, an employee in one arbitration will not be able to share discovery with other employees. § V., J.A. 46.

C. The Decision Below

The Ninth Circuit concluded that this case turned upon the issue of whether the "concerted activities" right was "interfered with" by the concerted action waiver in the EY Arbitration Agreement. Recognizing the significance of the decision of the NLRB in *D.R. Horton*, 357 NLRB 2277 (2012), Chief Judge Thomas analyzed that decision under the two step framework required by *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984). Pet. 3a-5a.

Under the first step of *Chevron*, the Circuit found that Section 7 of the NLRA "protects a range of concerted employee activity, including the right to 'seek to improve working conditions through resort to administrative and judicial forums.'" Pet. 7a (citations

omitted). The Circuit further found that the "separate proceedings" clause in the EY Arbitration Agreement "is the 'very antithesis' of § 7's substantive right to pursue concerted work-related legal claims." Pet. 9a-10a, *quoting. NLRB v. Stone*, 125 F.2d 752,756 (7th Cir. 1942). The Circuit agreed with the Board's finding that the "separate proceedings clause" "is 'interference' within the meaning of § 8." Pet. 8a. The Circuit further found that the "employer violates § 8 a second time by conditioning employment on signing a concerted action waiver." Pet. 8a-9a, (citations omitted)

As a result, the Circuit concluded: "The NLRA is unambiguous, and there is no need to proceed to the second step of *Chevron.* Thus, the 'separate proceedings' terms in the Ernst & Young contracts cannot be enforced." Pet. 11a. The Circuit also found that the right to "concerted activities" is a substantive federal right, Pet. 14a-17a, 20a-21a, which does not "specially disfavor" arbitration. Pet. 22a.

Therefore, construing Section 2 of the FAA, the Circuit found that "[w]hen an illegal provision not targeting arbitration is found in an arbitration agreement, the FAA treats the contract like any other; the FAA recognizes a general contract defense of illegality." Pet. 14a, *citing, AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Accordingly, the Circuit held that "nothing in the Supreme Court's recent arbitration case law suggests that a party may simply incant the acronym 'FAA' and receive protection for illegal contract terms anytime the party suggests it will enjoy arbitration less without those illegal terms. *** *Concepcion* supports no such argument." Pet. 23a.

Given the holding concerning the NLRA, the Circuit found it unnecessary to reach "plaintiffs' alternative

arguments regarding the Norris-LaGuardia Act." Pet. 24a-25a.

Judge Ikuda filed a dissent, which did not address Norris-LaGuardia.

SUMMARY OF THE ARGUMENT

I. The task before this Court is to determine the intent of Congress, primarily expressed in three statutes—the 1925 FAA, Norris-LaGuardia in 1932, and the NLRA in 1935—regarding protection of collective judicial action by employees. Norris-LaGuardia and the NLRA both protect employees' "right" to engage in "other concerted activities for *** mutual aid or protection." The arbitration agreements under appeal are governed by the FAA and all expressly bar "concerted" arbitration and all litigation.

A. The plain meaning of Norris-LaGuardia's and the NLRA's broad general term, "other concerted activities," encompasses any lawful and proper concerted activities through which workers "act together to better their working conditions ***." *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) (hereinafter "*Eastex*"), *quoting*, *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962). Every circuit to have directly addressed the plain meaning of "other concerted activities" has held that NLRA Section 7 protects collective or class judicial proceedings.

Petitioners never questioned the plain meaning of NLRA Section 7 below, but they now argue that an analysis of the statutory "text" shows that only concerted actions relating to self-organization or collective bargaining are protected. Pet. Br. 29-30, 43. At most, they argue "concerted" action may be protected to "assist" litigation, but not to participate in

it. *Epic* Br. 39-40. At a minimum, they argue the language is ambiguous. *Id.*

This Court already rejected the limitation of Section 7 to union related activities. *Eastex,* 437 U.S. 556, 565. Section 7's broad general right to engage in "other concerted activities" protects all lawful means of proceeding to raise collectively, and to resolve collectively, grievances concerning the terms and conditions of employment.

Congress did not protect only some forms of "concerted" activities and disregard others. *See NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 835 (1984). The specifically enumerated rights under Section 7 all relate to the ability of workers to collectively address employment grievances. Collective litigation under Section 16(b) of the FLSA fits squarely within Section 7's broad general protection of "other concerted activities for *** mutual aid or protection."

If there were ambiguity in the statutory text as Petitioners argue, the purpose and legislative history of the NLRA resolves that ambiguity and shows that collective judicial action is protected. The history of labor legislation in the 20th century shows an unmistakable congressional intent to protect the right of workers to act collectively, through any lawful means, to address and resolve employment disputes.

It is not true, as Petitioners claim, that class, collective or representative procedures only became established decades after the NLRA. *See* Pet. Br. 31. Representative and class actions existed since the founding of the Republic. Equity Rule 38, as amended in 1912, provided for class actions in appropriate cases.

B. If the FLSA is read harmoniously with the NLRA, as it must be, those two statutes further

evidence congressional intent to protect concerted judicial action. That protected right extends to state law class actions as well as to federal collective actions under Section 16(b) of the FLSA.

C. If there is still ambiguity remaining, the NLRB has consistently construed "concerted activities" to include concerted judicial and arbitral disputes since shortly after the NLRA was enacted. The NLRB's determination of ***the meaning of the NLRA*** is entitled to deference. *City Disposal Sys., Inc.*, 465 U.S. at 830; *Eastex,* at 568.

D. With the meaning of the NLRA resolved, the illegality of Petitioners' contractual prohibition of "concerted" litigation renders that prohibition unenforceable. The right to "concerted" litigation is a substantive right. Petitioners argue that even substantive rights can be waived. That argument misses the point. Employers may not lawfully "coerce" employees into such a waiver, or "interfere" with the waiver choice by making waiver a condition of employment, as Ernst & Young has here.

II. A. Denying enforcement to the "separate proceedings" term in the EY Arbitration Agreement is consistent with Section 2 of the FAA. Arbitration agreements were intended to be as enforceable as other contracts, no more. Congress did not intend to immunize arbitration agreements from the effects of earlier or later legislation that might cause those agreements to be illegal or unenforceable. Section 2 of the FAA proves that intent.

Sections 2 and 3 of Norris-LaGuardia, passed seven years after the FAA, protects the right of employees to engage in "concerted activities" for "mutual aid or protection." *Id.* §§ 102-103. Section 15 of Norris-LaGuardia ***expressly repeals*** any "acts or parts of acts" that are in conflict with its provisions. 29 U.S.C. § 115.

If the FAA conflicts with Norris-LaGuardia, then the FAA was expressly repealed to the extent of the conflict.

B. If the FAA conflicts with the NLRA, then the FAA also was impliedly repealed by the NLRA to the extent of the conflict. "When a statute specifically *** prohibits what [an earlier statute permitted, the earlier statute is *** impliedly repealed." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012).

Under the last-in-time canon where statutes are in conflict, the general rule is that the later statute repeals the earlier one. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976). Petitioners claim other canons, *ejusdem generis* and the canon that a specific statute governs a general one, support a different result. They do not. Even if they did, the last-in-time canon is the tie-breaker. To the extent of any conflict between the FAA and the later enacted NLRA, the FAA was repealed by necessary implication.

The Acting Solicitor General argues that the Section 7 right to engage in "concerted activities" cannot apply to collective litigation under Section 16(b) of the FLSA. He claims to so hold would "expand the availability of class or collective remedies beyond those that are authorized by" the FLSA itself. U.S. Br. 10. That would be true only if the FLSA impliedly repealed or limited the rights granted in the NLRA by not including and re-passing those rights as a separate section of the FLSA.

The text and legislative history of the FLSA, when read in harmony with the NLRA, supports the conclusion that Congress did intend to protect collective litigation. The Acting Solicitor General cites no contrary evidence.

C. Petitioners argue that the holdings of this Court require a new and special canon of statutory construction: any federal statute that might impact an arbitration agreement must contain a "clear" congressional command with an explicit reference to the FAA and clearly state an intention to overrule the FAA. *See* Pet. Br. 22-24, *citing CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 100 (2012).

Neither *CompuCredit* nor any prior authority requires an "explicit reference" to the FAA in order to outlaw certain contractual terms. *Id.* at 109. (Sotomayor, J. and Kagen, J. concurring). Declaring a contractual term to be ***illegal*** is as clear a Congressional command as any that can be imagined.

Moreover, the 69th Congress which passed the FAA had no power to create an enforceable "explicit reference" binding on later sessions of Congress. A later Congress may "make its will known in whatever fashion it deems appropriate—including the repeal of pre-existing provisions by simply and clearly contradicting them." *Lockhart v. United States*, 546 U.S. 142, 148 (2005) (Scalia J., concurring with unanimous court).

D. The decision below reads the FAA and the NLRA harmoniously. It preserves arbitration for any individual dispute where the employee choses to proceed individually. It preserves class arbitration only if the contract of the parties contains an agreement for that result.

III. Under Norris-LaGuardia, Congress restricted federal courts from enforcing contracts contrary to the policy expressed in Section 2 of that Act. Respondents respectfully suggest there is a limitation on the remedies that may be provided to Petitioners. Federal courts are without authority to enforce Petitioners'

arbitration agreements or to compel Respondents to engage in individual arbitration.

ARGUMENT

The congressional intent in passing Norris-LaGuardia, the NLRA and the FAA is clearly expressed through the text, legislative histories, and purposes of those statutes. Notwithstanding Petitioners' and the Acting Solicitor General's many complex, conflicting, and self-contradictory arguments, the issues before the Court can be resolved simply by applying the plain meaning of the text of those statutes.

The first question that must be addressed is whether, in the unique and specialized context of employer and employee disputes, Congress intended to preclude enforcement of agreements prohibiting "concerted" litigation. It did. Congress rendered such agreements both unenforceable (in Norris-LaGuardia) and illegal (in the NLRA).

If an otherwise illegal and unenforceable contract term is contained in an arbitration agreement, the next question that must be answered is whether the FAA creates an exception to the "concerted activities" "right" established in the NLRA. A plain reading of FAA Section 2 makes clear that Congress had the opposite intent. Congress did not seek to have the FAA supplant any earlier or later statute which makes an arbitration agreement or any of its terms unenforceable. There is no conflict between the FAA and the NLRA.

Were there a conflict between the FAA and the "concerted activities" clause of the NLRA and Norris-LaGuardia, the NLRA must be enforced. This Court's arbitration jurisprudence does not purport to, and does

not, overcome that clearly expressed congressional intent.

I. CONGRESS CLEARLY INTENDED TO MAKE EMPLOYMENT CONTRACTS LIMITING EMPLOYEE "CONCERTED ACTIVITIES" ILLEGAL AND UNENFORCEABLE.

Congress intended to remediate the unequal bargaining power between employers and employees by protecting the right of employees to "band together," and confront their employer collectively, in any lawful manner they believed to be effective. NLRA Section 7 thus gave employees the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *See* 29 U.S.C. § 157.

Similar language was included earlier in Norris-LaGuardia, which established the "public policy of the United States" to protect the "individual unorganized worker" from "interference" "by employers" with those "concerted activities." Norris-LaGuardia Section 2, 29 U.S.C. § 102 (emphasis supplied).

A. The Plain Meaning of the Statutory Language Includes Judicial and Arbitral "Concerted Action."

The broad general language of Section 7 of the NLRA encompasses a wide and diverse range of concerted activities. The statutory language does not suggest that the common, and often essential, right of employees to take judicial action, is somehow deserving of less protection than all other protected "concerted activities." *See City Disposal Sys., Inc.*, 465

U.S. at 835. "If a statute's meaning is plain," the Court "must give effect to the unambiguously expressed intent of Congress." *Holly Farms Corp. v. Nat'l Labor Rels. Labor Bd.*, 517 U.S. 392, 398-99 (1996), *quoting, Chevron U.S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Circuit City Stores v. Adams*, 32U.S. 105, 109, (2001).

1. The Ordinary Meaning of "Other Concerted Activities for *** Mutual Aid or Protection" Includes any Lawful Concerted Activity to Address the Terms and Conditions of Employment.

The statutory language of the NLRA should be interpreted "broadly." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 13 (2011). The use of the word "other" in the phrase "other concerted activities" indicates "an intent on the part of Congress to afford broad rather than narrow protection to the employee." Cf. *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972) (construing the word "otherwise" in Section 8 (a)(4)).

The Acting Attorney General concedes that Respondent's reading of Section 7 to protect concerted judicial action may be "permissible." U.S. Br. 14. *EY* Petitioners concede that interpretation is perhaps "plausible," but find the language at best "ambiguous." Pet. Br. 27-28. *Epic* Petitioners conclude that "construing 'concerted activities' to include class proceedings" is "not even . . . *plausible*. . ." *Epic* Br. 33-34 (emphasis in the original).

This Court has read the NLRA much more broadly. Even when interpreting very narrow language in the NLRA anti-retaliation provisions, this Court has expanded that language to provide broader protections consistent with the statute's purpose. *Kasten*, 563 U.S. at 13, *citing, Scrivener*, 405 U.S. at 123. Thus, the statutory prohibition in Section 8(a) (4) on retaliation against workers who had "filed charges" with the Board or had "given testimony," before the Board, was "broadly interpreted" as "protecting workers who *neither* filed charges *nor* were "called *formally* to testify" but simply "participate[d] in a [National Labor Relations] Board investigation." *Id.* (emphasis in the original); 29 U.S.C. § 158(a)(4).

"The ordinary meaning of the word 'concerted' is: 'jointly arranged, planned, or carried out; coordinated.' Concerted, NEW OXFORD AMERICAN DICTIONARY 359 (3d ed. 2010). Activities are 'thing[s] that a person or group does or has done' or 'actions taken by a group in order to achieve their aims.' *Id.* at 16. Collective or class legal proceedings fit well within the ordinary understanding of 'concerted activities.'" *Epic* Pet. 5a.

In *Eastex*, this Court found distribution of a newsletter seeking opposition to a state constitutional amendment relating to a "right to work" law, and encouraging election of "friends" of labor were protected activities under Section 7. *Eastex* held: "The 74th Congress knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context." *Eastex*, 437 U.S. at 565.

Six years later, in *City Disposal Sys., Inc.*, 465 U.S. at 822, this Court held that "[t]here is no indication that Congress intended to limit this protection to

situations in which *** fellow employees combine with one another in any particular way." *Id.* at 835. Similarly there is no indication that Congress protected a panoply of "activities" by employees to increase their wages including the rights to unionize, the right to strike, the right to engage in political activity, but nonetheless left completely unprotected litigation ***by employees***, to enforce their ***rights as employees***, to ***wages*** guaranteed them by law.

Unsuprisingly, without exception, those courts of appeal to have addressed the issue have found that the "mutual aid or protection" clause encompasses collective judicial proceedings. *NLRB v. Alternative Entm't, Inc.*, 858 F.3d 393, 408 (**6th Cir.** May 26, 2017)("§ 8 makes it illegal to force workers, as a condition of employment, to give up the right to concerted legal action, whether that right is substantive or procedural") (emphasis supplied); *Morris v. Ernst & Young, LLP,* Pet. 7a-9a (**9th Cir.** 2016)(NLRA unambiguously provides that "'mutual aid or protection clause' includes the substantive right to collectively 'seek to improve working conditions through resort to administrative and judicial forums.'"); *Lewis*, Epic Pet. 5a. (**7th Cir.** 2016), ("[c]ollective or class legal proceedings fit well within the ordinary understanding of 'concerted activities.'"); *Brady v. NFL*, 644 F.3d 661, 673 (**8th Cir.** 2011) ("a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is 'concerted activity' under § 7 of the National Labor Relations Act."); *Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1188, 1189 (**D.C. Cir.** 2000)("mutual aid or protection" clause protects collective action in litigation); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (**5th Cir.** 1976)("filing by employees of a labor related civil

action is protected activity under section 7 of the NLRA"); *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (**1st Cir.** 1973) ("the filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by § 7").

None of those courts found any ambiguity in the language of Section 7. Petitioners do not explain why an interpretation that is merely "plausible," or "not even plausible," was found plainly correct and unambiguous by so many experienced circuit court judges.

2. Reading the "Other Concerted Activities" Clause as a Whole, and Together with Other Sections of the NLRA, Supports its Plain Meaning to Encompass Concerted Judicial Action.

Without having raised the argument below, Petitioners raise a textual argument and now assert that the phrase "other concerted activities" must be understood to "embrace only [conduct] similar in nature to [the conduct] enumerated by the preceding specific words." Pet. Br. 27-28, *citing*, *Yates v. United States*, 135 S. Ct. 1074, 1086 (2015); *see also*, *Epic* Pet Br. 33-34. They argue that since arbitration and litigation are not mentioned in the specifically enumerated rights, they cannot be included in the broad general final phrase. *See* Pet. Br. 27-28.

If the canon of *ejusdem generis* does apply to the concept Petitioners seek to advance, it refers to the "***general*** nature" of the prior terms, as providing context, to a final phrase. *See Circuit City Stores*, 532 U.S. at 109. (emphasis added). Petitioners fail to analyze the "general nature" of the "proceeding specific words" other than to make the claim that the general words refer only to "self-organization" and

"collective bargaining." Pet. Br. 27, 43-44; *See also,* U.S. Br. 11, 20-22.

A substantially similar argument was raised in *Eastex* and rejected by this Court. There, the question was whether protected activity included passing out leaflets which opposed certain legislation, or encouraged the election of "friends" of labor. Petitioner there, like Petitioner here, argued that "other mutual aid or protection" only referred to activities similar to collective bargaining. The Court disagreed holding: "the language of § 7 makes clear, to protect concerted activities for the somewhat broader purpose of 'mutual aid or protection' as well as for the narrower purposes of 'self-organization' and 'collective bargaining.'" *Eastex*, 437 U.S. at 565; *cf., CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 285 (2011) (reading final phrase "another tax," to encompass "any form of tax a State might impose, on any asset or transaction," except for the preceding specific words.).

Second, in *Eastex,* his Court held that the language of Section 7 "expresses Congress' recognition of the 'right of wage earners to organize and to act jointly in questions affecting wages.'" *See Eastex*, 437 U.S. at 565 n.14. Class and collective litigation to enforce legally required overtime payments is precisely that.

Third, the Court does not limit its "inquiry to the text of" Section 7 "in isolation. '[I]nterpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning.'" *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017), *quoting, Maracich* v. *Spears*, 133 S. Ct. 2191, 2203 (2013). Section 1 of the NLRA "declared *** the policy of the United States" to include "protect[ing] the exercise by workers of full freedom of association *** for the purpose of negotiating the terms and conditions

of their employment or other mutual aid or protection." 29 U.S.C. § 151. That section provides still further support for a broad reading of Section 7 to include collective litigation.

3. The Purpose and Legislative History of Norris-LaGuardia and the NLRA, and the Roughly Contemporaneous FLSA Show Congressional Intent to Protect Collective Legal Action.

The purpose and the legislative history of the NLRA and Norris-LaGuardia strongly support the conclusion that concerted judicial and arbitral actions are protected by Section 3 of Norris-LaGuardia and Section 7 of the NLRA. The purpose and legislative history thus resolves any "ambiguity" Petitioners find in the statutory language. Pet. Br. 28. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226-227 (1987).

a. Norris-LaGuardia and the NLRA Sought to End Judicial Hostility to Collective Action by Workers.

Norris-LaGuardia and the NLRA grew out of two historic struggles: the struggle of labor to act collectively to obtain better bargaining power with employers; and the struggle by Congress to overcome "the social and economic ideas of judges, which *** became translated into law, [and] were prejudicial to a position of equality between workingman and employer ***." *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 485 (1921)(Brandeis, J. joined by Holmes, J., and Clarke, J. dissenting).

Throughout the 19th century, courts issued many rulings hostile to labor based on both constitutional and statutory grounds. Courts "had reinterpreted

federal statutes that Congress had not intended for use against the organizing activities of labor unions." *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 542 (2002)(Breyer, J., joined by Stevens, J., Souter, J. and Ginsberg, J. concurring in part and concurring in the judgment) (citations and parentheticals omitted).

Congressional efforts to overcome this judicial hostility to the right of workers to act collectively began with the Clayton Act in 1914. 9 U.S.C. § 1, *et seq.* Section 20 of that Act restricted the issuance of injunctions "in any case between an employer and employees, *** or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right *** ." 29 U.S.C. § 52.

When that proved insufficient to combat judicial hostility to employees acting collectively, Congress passed Norris-LaGuardia. "The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction." *United States v. Hutcheson*, 312 U.S. 219, 235-36 (1941).

"Similar objectives informed Congress' later enactment of the NLRA ***." *BE&K Constr. Co.* 536 U.S. at 543 (concurring opinion). Congress sought "to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment." *City Disposal Sys., Inc.*, 465 U.S. at 835. As Section 2 of Norris-LaGuardia and Section 1 of the NLRA make clear, Congress felt that "concerted" action was essential because it recognized that "the individual unorganized worker is commonly helpless to exercise

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actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment ***. 29 U.S.C. § 102; *see also,* 29 U.S.C. § 151.

The purpose and legislative history of Norris-LaGuardia and the NLRA reflects congressional intent to protect a worker's right to "concerted" action whenever the worker was (in the words of *City Disposal*) "confronting an employer regarding the terms and conditions of employment."

b. Representative, Class and Collective Litigation Had Been Established for Over a Century When Norris-LaGuardia and the NLRA Were Passed.

Petitioners are wrong when they argue that there is "no indication that, when Congress enacted the NLRA it was concerned about protecting the ability to invoke class or other collective procedures when pursuing claims arising under other statutes." Pet. Br. 29. Congress surely was aware that confronting an employer regarding the terms and conditions of their employment, might sometimes occur in court, or for that matter in arbitration. There is ***no indication that Congress did not intend to protect*** concerted action in judicial or arbitral proceedings.

"[R]epresentative suits have been recognized in various forms since the earliest days of English law." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832 (1999) *citing.* S. Yeazell, *From Medieval Group Litigation to the Modern Class Action* (1987); *and* Marcin, *Searching for the Origin of the Class Action*, 23 Cath. U. L. Rev. 515, 517-24 (1973). From the earliest days of the Republic, proceedings in Equity allowed for joinder of many parties, and if too numerous, exceptions to the necessary party rule allowed for

representative plaintiffs. Equity also allowed for the combination of suits through bills of peace. *Id.*

Rule 38 of the Equity Rules of this Court, promulgated in 1912, provided for class suits, much like Rule 23 today: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." *See Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 363-64 (1921). *See also, Kelly v. Cent. Hanover Bank & Tr. Co.*, 11 F. Supp. 497 (S.D.N.Y. 1935) (plaintiff suing in a class suit on behalf of herself and all other debenture holders).

In *Hansberry v. Lee*, 311 U.S. 32 (1940), this Court collected cases, going back more than a century before that, illustrating the "familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present ***." *Id.* at 42-43.

The Supreme Court's Advisory Committee started work on its Preliminary Draft of the Federal Rules of Civil Procedure in 1935. When that draft was presented it contained the original version of Rule 23. *See* Moore, *The Federal Rules of Civil Procedure: Some Problems With The Preliminary Draft*, 25 Geo. L. J. 551, 570-76 (1937).

Prior to Norris-LaGuardia and the FLSA, battles between employees and employers were often conducted in court, *e.g., United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922), and sometimes in arbitration. *E.g., Chas. Wolff Packing Co. v. Court of Indus. Relations*, 267 U.S. 552

(1925)(addressing mandatory arbitration under Kansas Industrial Relations Act).

Accordingly, there is no reason why Congress would have had to expressly mention litigation or arbitration in order to protect the right of employees to engage in concerted actions in those forums. If Congress intended to carve out judicial or arbitral proceedings from the broad general protection of "other concerted activities," the natural way to do so would have been to identify that intended exception. To paraphrase this Court's holding in *City Disposal,* there is no indication that Congress intended to limit its protection of "concerted activities" to only certain types of the many "activities" available for resolution of employment disputes.

B. The FLSA Collective Litigation Remedy is Further Evidence that Congress Intended NLRA's Section 7 "Concerted Activity" Right to Extend to Litigation.

Following passage of the NLRA, the next session of Congress passed the FLSA, 52 Stat. 1060, 29 U.S.C. § 201 *et seq.* The FLSA established legally enforceable federal rights to minimum wages and overtime pay and included a right to sue, "which puts directly into the hands of the employees who are affected by violation the means and ability to assert and enforce their own rights ***." Sloan, 4 American Landmark Legislation (1984), at 465, Congressional Debates (House), June 14, 1938 (comments of Congressman Kent Keller, member of Conference Committee).

The Acting Solicitor General makes the counter-intuitive and counter-factual argument that the Section 7 right to engage in "concerted activities" cannot apply to collective litigation under Section 16(b) of the FLSA because to so hold would "confer[ ]

greater rights to pursue FLSA claims collectively than does the FLSA itself." U.S. Br. 10. Both the premise and the conclusion are wrong. If the FLSA and the NLRA are read together harmoniously, they fully support the conclusion that Congress intended to protect collective and class litigation.

1. This Court Has Never Held That the FLSA Does Not Protect Collective Judicial Action.

The Acting Solicitor General takes the position that the FLSA did not create a collective action "right" by enacting Section 16(b). U.S. Br. 9-10, 16. This Court has never addressed that issue and a there is a split in the circuits as to whether Section 16(b) creates such a right.[1]

Petitioners' and the Acting Solicitor General's reliance on *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991), *e.g.* Pet. Br. 25, U.S. Br. 16, is misplaced. *Gilmer* did not resolve or even address the question of whether the FLSA created a right to engage in collective litigation under Section 16(b). One of the questions in *Gilmer* was whether the Age Discrimination in Employment Act ("ADEA") created such a right merely by "cutting and pasting" Section 16(b) of the FLSA into the ADEA. *Gilmer* involved an individual employee seeking to proceed individually in court and avoid individual arbitration. Gilmer argued that because class arbitration (which he did not seek)

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[1] *Compare, Killion v. KeHE Distribs.*, LLC, 761 F.3d 574 (6th Cir. 2014); *and Boaz v. FedEx Customer Info. Servs.*, 725 F.3d 603 (6th Cir. 2013), *with, Owen,* 702, F.3d at 1054-55 (citing *Gilmer, Concepcion, CompuCredit,* and *Italian Colors*); *Sutherland,* 726 F.3d at 296 (quoting *Italian Colors*); *Carter v. Countywide Credit Indus.*, 362 F.3d 294, 298 (5th Cir. 2004) (citing *Gilmer*); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 502 (4th Cir. 2002) (citing *Gilmer*).

was arguably unavailable under the arbitration agreement, the arbitration agreement was invalid.

We do not argue that merely "cutting and pasting" the language of Section 16(b) into any statute would automatically create a "right" to collective action. Under *Gilmer* and *CompuCredit*, in the absence of further support in the statutory language, legislative history, or purpose of an Act, a cut and paste by itself would be insufficient. Nor do we argue that an arbitration agreement may not be enforced to address individual claims, where an employee does not seek to enforce his or her right to engage in concerted activities. *Gilmer*, therefore, does not address any issue before the Court in these cases.

2. Reading the FLSA Harmoniously With the NLRA Demonstrates Congressional Intent to Protect Collective Judicial Action.

In all events, it really does not matter whether the FLSA itself did or did not create workers' "right" to concerted judicial action. The NLRA surely did. In light of the NLRA, "there was no need for Congress to include explicit language about" protection of "concerted activities" in the FLSA. *Cf. CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 453-54 (2008).

The language used to define the employees' right to sue in the FLSA paralleled the language used to define the scope of the right to "concerted action," individually, collectively, or through a designated representative, as set forth in Norris-LaGuardia and the NLRA. Section 16(b) was only amended later by the Portal-to-Portal Act of 1947 to require an "opt in" class procedure. *See Integrity Staffing Sols., Inc. v. Busk*, 135 S. Ct. 513, 516 (2014).

The FLSA "is a part of the social legislation of the 1930's of the same general character as the [NLRA]."

Rutherford Food Corp. v. McComb, 331 U.S. 722, 723-24 (1947). Passage of the two statutes was "relatively contemporaneous." *Kasten*, 563 U.S. at 22 n.4. (Scallia, J. with Thomas, J. dissenting).

"[U]nder the *pari materia* canon, statutes addressing the same subject matter generally should be read 'as if they were one law.'" *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 306 (2006), *quoting, Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972). That canon "assumes that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject***." *Erlenbaugh v. United States*, 409 U.S. at 243.

The FLSA and the NLRA must be read together in harmony, if not in *pari materia*. *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 100 (1991) (statutes should be construed to "contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law.").

The Acting Solicitor General's argument, that the FLSA must be read in isolation from the NLRA, conflicts with the argument that the Acting Solicitor General and petitioners advance so vigorously regarding the principle of reading federal statutes "harmoniously." Pet. Br. 13 *Epic* Br. 13-14.

Reading Section 7 and Section 16(b) as if they appeared in the same statute, as the *pari materia* canon, requires, the fact that a specific enforcement mechanism was enacted in a later section of the same statute, would not suggest that the right was somehow diminished or abrogated by the later enforcement terms.

The Acting Solicitor General's argument makes no greater sense if the two statutes are simply read harmoniously, rather than in *pari materia*. To do

otherwise is akin to a implied partial repeal, which petitioners and the Acting Solicitor General correctly point out is disfavored.

The fact that an employer acts unlawfully if it retaliates against the filing of a Section 16(b) action is further evidence filing such suits collectively is a substantive right. Retaliation is unlawful interference with a legal right, not interference with a mere "procedural mechanism."[2] *See BE&K Constr. Co.* 536 U.S. at 533 (retaliatory suits are those "filed in retaliation for the exercise of the employees' [NLRA] § 7 rights."), *quoting, Bill Johnson's Rests. v. NLRB*, 461 U.S. 731, 747 (1983). The "anti-retaliation" provisions of the FLSA cover retaliation for "fil[ing] any complaint or institut[ing] or caus[ing] to be instituted any proceeding under or related to this Act [the FLSA]." 29 U.S.C. § 215(a)(3). That provision protects an employee from retaliation for filing a Section 16(b) action as epic Petitioners concede. *Epic* Br. 37. *See also* U.S. Br. 24.

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There is no support cited, and none we can discover, to buttress the Acting Solicitor General's argument that the NLRA was intended to be narrowly construed, and frozen in time. To the contrary, this Court has recognized that the NLRA is interpreted to adapt "to changing patterns of industrial life." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). Similarly, the types of "concerted activities" that are protected

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[2] That is not to say that a prohibition on retaliation necessarily can be inferred from wage and hour rights in the absence of an antiretaliation provision. Broad antidiscrimination provisions may also encompass an implied "antiretaliation component." *Gomez-Perez v. Potter*, 553 U.S. 474, 494 (2008) (Roberts, C.J., joined by , Scalia, J. and Thomas, J., dissenting in part). The FLSA is not such a statute.

likewise adapts to changes in the types of "activities" available to employees which they may engage in "concertedly." *See NLRB v. Pier Sixty, LLC*, 855 F.3d 115, 125 (2d Cir. 2017)(Facebook "is a key medium of communication among coworkers and a tool for organization in the modern era."); *Three D, LLC v. NLRB*, 629 F. App'x 33, 36 (2d Cir. 2015)(upholding Board determination that Facebook posts are protected under Section 7 of the NLRA).

The FLSA, adopted near in time to the NLRA, provides strong support for the conclusion that the collective judicial actions are included among the rights protected by Section 7.

3. The Text of the FLSA Provides Further Support for Interpreting the NLRA to Also Protect Rule 23 Class Actions Based on State Law Claims.

NLRA protection also extends to Rule 23 class remedies for employees seeking to vindicate violation of state law wage and hour laws. Nothing in the text or the history of the NLRA supports excluding Rule 23 class actions under state wage and hour laws from the protection of Section 7. The text and history of the FLSA supports the opposite conclusion.

Section 16(b) as originally drafted provided for representative or collective ligation by one or more employees or their designated agent or representative. 52 Stat. 1060 § 16(b). Section 16(b) "explicitly limits its scope to the provisions of the FLSA, and does not address state-law relief." *Knepper v. Rite Aid Corp.*, 675 F.3d 249, 260 (3d Cir. 2012).

Section 18(a) of the FLSA contains a saving clause stating: "No provision of this chapter *** shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage

higher than the minimum wage *** or a maximum work week ***." 29 U.S.C. § 218(a). "In the absence of a direct expression by Congress of its intent to depart from the usual course of trying 'all suits of a civil nature' under the Rules established for that purpose, class relief is appropriate in civil actions brought in federal court ***." *Califano v. Yamasaki,* 442 U.S. 682, 700 (1979). That includes state law claims brought in federal court under diversity or pendant jurisdiction.

Every circuit to have considered the issue has found that there is no indication of any congressional intent in the FLSA to deny employees the right to sue on state law claims in federal court under Rule 23 even if joined in the same action as FLSA claims brought under Section 16(b). *See e.g., Busk v. Integrity Staffing Sols., Inc.*, 713 F.3d 525, 528 (9th Cir. 2013), *rev'd on other grounds, Integrity Staffing Sols., Inc. v. Busk*, 135 S. Ct. 513 (2014); *Knepper*, 675 F.3d at 253-62 (3d Cir. 2012); *Ervin v. OS Rest. Servs., Inc.*, 632 F.3d 971, 976-79 (7th Cir. 2011); *Salim Shahriar v. Smith & Wollensky Rest. Grp.*, 659 F.3d 234, 247-49 (2d Cir. 2011); *Lindsay v. Gov't Emps. Ins. Co.*, 448 F.3d 416, 424, 371 U.S. App. D.C. 120 (D.C. Cir. 2006).

There is no basis to conclude that the protection of judicial action in Section 7 does not extend to Rule 23 class actions.

C. The NLRB's Determination of the Meaning of Section 7 and Section 8 of the NLRA Must be Given Deference.

In *D.R. Horton, Inc.* and *Murphy Oil,* 361 N.L.R.B. No. 72 (2014), the NLRB ruled that contracts including arbitration agreements, entered into as a condition of employment, which require employees to litigate employment disputes on an individual basis only, "unlawfully restrict[ ] employees' Section 7 right to

engage in concerted action for mutual aid or protection" and are an unfair labor practice under Section 8. *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012); *Murphy Oil*, 361 N.L.R.B. No. 72 (2014).

Long standing precedent of this Court requires deference to the NLRB's interpretation of the NLRA. *E.g.*, *City Disposal Sys., Inc.*, 465 U.S. at 830 ("we have not hesitated to defer to the Board's interpretation of the [NLRA]"); *Chevron, U.S.A., Inc.*, 467 U.S. at 844 ("considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"); *see also, Lechmere, Inc. v. NLRB*, 502, 536 (1992); *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987); *Lewis.*, Epic Pet. 5a (7th Cir. 2016); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1054 (8th Cir. 2013); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 356 (5th Cir. 2013). The Board also found that the arbitration agreements were in violation of Section 3 of Norris-LaGuardia. *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012). That aspect of the decision is entitled to deference "to the extent that it is persuasive" under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1945).

In order to apply *Chevron* deference, "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron, U.S.A., Inc.*, 467 U.S. at 843. The Acting Solicitor General concedes that "the Board's interpretation of ambiguous NLRA language is entitled to judicial deference" and "may govern in contexts where the FAA does not apply." U.S. Br. 23. That concession effectively resolves the issue of the meaning of the NLRA. Whether the NLRA, so interpreted, conflicts with the FAA, and, if

so, which statute takes precedence are separate questions. Petitioners' analysis conflates those arguments in a way the obscures the congressional intent rather than illuminating it. *See* Pet. Br. 48-49.

Petitioners argue that the Board's determination in adjudication is not entitled to deference because the Board's 2012 decision "reversed course" from a 2010 "guidance memorandum" by the General Counsel of the Board which reached a different conclusion. Pet. Br. 49. However, rulemaking or adjudicatory decisions ***of the Board*** represent the considered judgment of the agency, *see NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975), and as such they are entitled to deference. A General Counsel's Advice Memorandum constitutes advice issued by the General Counsel to his staff, which does not bind the Board, and is not entitled to deference from the courts. *See* 29 U.S.C. § 153(d) (powers of General Counsel); *Kent Corp. v. NLRB*, 530 F.2d 612, 618 (5th Cir. 1976) (memoranda of the General Counsel directing the filing of a complaint do not inform the public about agency law).

The Board's position has been consistently held since the earliest days after the NLRA was passed. *Spandsco Oil & Royalty Co.*, 42 N.L.R.B. 942, 948-949 (1942); *Murphy Oil*, 361 NLRB No. 72, *Murphy Oil* Pet. 17a. In all events, the Board's decision is indisputably correct, as seven circuit courts have found and the above analysis shows.

D. The EY Arbitration Agreement Unlawfully Interferes with the Right of Employees to Proceed In "Concert" With Other Employees.

Section 8(a)(1) of the NLRA explicitly prohibits employers from "interfering with, restraining, or coercing employees in the exercise of the rights guaranteed" in Section 7, *BE&K Constr. Co.*, 536 U.S.

at 536. A contract which prohibits engaging in "concerted activity" unlawfully "interferes with" the exercise of Section 7 rights, and so this Court has found.

In *National Licorice Co. v. NLRB*, 309 U.S. 350, 360 (1940), and *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944), this Court established the proposition that individual employment contracts that prohibit or discourage the exercise of Section 7 rights are unlawful under Section 8. In *National Licorice,* this Court invalidated an employers' individual contract with employees which provided that discharged employees could complain to the employer that his or her discharge was unreasonable, but precluded the ability of employees to raise the "question as to the propriety of an employee's discharge [in] arbitration or mediation." *National Licorice,* 309 U.S. at 360.

This Court held that provision was unlawful because "[t]he effect of this clause was to discourage, if not forbid, any presentation of the discharged employee's grievances to appellant through a labor organization ***or his chosen representatives, or in any way except personally.*** *Id.* (emphasis supplied). That contractual term violated the NLRA because it "stipulated for the renunciation by the employees of rights guaranteed by the Act, and were a continuing means of thwarting the policy of the Act ***." *Id.* at 361.

Epic Petitioners and the Acting Solicitor General seek to distinguish *National Licorice* by focusing exclusively on the part of the opinion dealing with the contractual requirement that employees bargain through an employer dominated "Committee." *See id.* at 353-54; *Epic* Br. 46, U.S. Br. 27-28. But the contract and this Court's opinion in that case were broader than that argument suggests. The "employer

dominated union" issue that *Epic* Petitioners and the Acting Solicitor General concentrate on was only one of the two unlawful contract issues in that case. The relevant provision is the one discussed above.

In *J. I. Case*, 321 U.S. 332, this Court recognized the that the NLRA established "the public interest [in] preventing unfair labor practices" and held "[w]herever private contracts conflict with [the enforcement of the NLRA] they obviously must yield or the Act would be reduced to a futility." *Id.* at 337.

Epic Petitioners, and the Acting Solicitor General strain to limit the rule in *National Licorice* and *J.I. Case*, to contracts which interfere with collective bargaining through a labor organization. *Epic* Br. 46. That interpretation would leave the great majority of workers who are not unionized unprotected by the Act. Congress has expressed no such intent. *Washington Aluminum Co.*, 370 U.S. at 14 (non-unionized workers covered by Section 7). Contrary to the arguments of the Acting Solicitor General and Petitioners in this case and in *Epic*, the prohibition on the use of employment agreements to undermine the protections of the NLRA extends as far as the protections of the NLRA themselves, and there is no indication that Congress intended any lesser protections when employer individual contracts were involved.

Epic Petitioners and the Acting Solicitor General argue that reading the NLRA to require the availability of class or collective relief would lead to the "absurd" result of disabling the employer from even "opposing a request for class certification, no matter what the forum," and courts "would be unable to deny" class certification. *Epic* Br. 48-49; *but compare* U.S. Br. 21-22 (taking the opposite position). That result would indeed be "absurd," but it would not occur.

"'First Amendment and federalism concerns' prevent interfering with the employer's right to pursue any 'well-founded' defense in litigation, even if motivated by a 'desire' to interfere with employees 'exercising rights protected by the NLRA.'" *See BE&K Constr. Co.*, 536 U.S. at 526-27 (brackets omitted).

II. THE FAA DOES NOT SUPERSEDE NORRIS-LAGUARDIA OR THE NLRA, OR RENDER THE EY ARBITRATION AGREEMENT LAWFUL.

The FAA "was designed to allow parties to avoid 'the costliness and delays of litigation,' and to place arbitration agreements 'upon the same footing as other contracts ***.'" *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974) (citations omitted). "The legislative history demonstrates that the Act's purpose was solely to bind merchants who were involved in commercial dealings." *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1089 (9th Cir. 1998), *overruled based on the text of the statute, Circuit City Stores,* 532 U.S. 105, *citing, Local 205, United Elec. Workers v. General Elec. Co.*, 233 F.2d 85, 99 (1st Cir. 1956) (citations omitted).

A. The FAA's Savings Clause Shows Congressional Intent to Preserve Defenses Such as Illegality Under Federal Law.

Given the purpose of the FAA, it is unsurprising that the statute contains a saving clause which provides that arbitration agreements are to be treated like other contracts with respect to their enforcement. Section 2 of the FAA provides: a contract evidencing a transaction involving commerce to settle by arbitration *** shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or*

in equity for the revocation of any contract." 9 U.S.C. § 2 (*emphasis added*).

This Court has consistently held that illegality under federal law is a ground for denying enforcement of a contract. *E.g.*, *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77 (1982)(emphasis supplied). *See also*, *W. R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983). Petitioners argue that illegality under federal law is not encompassed within the FAA's savings clause because it is not "necessary" to protect federal statutes, Pet. Br. 34, and because the defense of illegality is primarily a state law issue. Pet. Br. 35. Neither argument survives a closer analysis.

As Petitioners argue, a saving clause is not "necessary" to preserve a subsequent Congress' power to repeal an earlier statute. However, they draw from that fact the unwarranted conclusion that a saving clause ***never*** applies to federal statutes. Pet. Br. 33-34; *Epic* Br. 20; *but see* U.S. Br. 30-31(saving clause "would cover *** a federal law that barred enforcement of contracts on a generally applicable ground"). That argument is both wrong and self -contradictory. Because of the last-in-time canon, a saving clause is needed to "save" prior inconsistent federal legislation.

For example, the Sherman Act's prohibitions on contracts in restraint of trade, 15 U.S.C. § 1, using Petitioners' logic, would be impliedly repealed in the absence of a "saving clause." Conversely, if legislation passed by an earlier Congress might take precedence over an enactment of a later Congress, (as Petitioners argue the FAA does here) then a saving clause disavowing that precedence is critical and should be enforced.

Section 2's saving clause makes crystal clear the intention of Congress to make arbitration agreements ***only*** "as enforceable as other contracts, not more so."

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967); *see Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (Section 2 "establishes an equal-treatment principle"); *Epic* Br. 24.

Section 2 thus reflects a clear congressional intent to preserve any earlier legislation declaring certain contracts unenforceable (such as the Sherman Act), as well as later legislation declaring arbitration agreements unlawful or unenforceable, including Norris-LaGuardia and the NLRA. That reading of Section 2 is consistent with this Court's precedent. *See W. Va. Univ. Hosps.*, 499 U.S. at 100. Petitioner's reading of Section 2 is not.

Petitioners and the Acting Solicitor General argue on the basis of various canons of statutory construction the FAA should take precedence over the NLRA. The saving clause reveals the opposite congressional intent: to preserve the right of any subsequent Congress to render arbitration agreements, or terms of those agreements, unlawful. In attempting to discern the intent of Congress as expressed in both the FAA and the NLRA, the clarity of intent expressed in the saving clause is determinative.

B. Norris-LaGuardia Expressly Repealed All Conflicting Parts of the FAA. Had it not, the NLRA Impliedly Repealed Those Conflicting Parts.

Petitioners, do not deny that Congress has the power to limit, amend, or repeal the FAA entirely or in part. *See* Pet. Br. 21; Epic Br. 21. Petitioners' central argument is that based on this Court's "arbitration jurisprudence" the FAA has restrictive impact on the ability of ***any subsequent legislature*** to exercise that power. Yet, they fail to recognize that if the FAA is

read to allow employers to "interfere" with the right of workers to engage in "concerted" judicial or arbitral dispute resolution, that part of the FAA has been repealed, both expressly and impliedly.

From the earliest days of the Republic, this Court recognized the foundational principle that "one legislature cannot abridge the powers of a succeeding legislature." *Fletcher v. Peck*, 10 U.S. 87, 6 (1810). A long and unbroken line of Supreme Court precedent embraces that proposition. *See e.g., United States v. Winstar Corp.*, 518 U.S. 839, 872, (1996) (plurality opinion); *Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932) ("[T]he will of a particular Congress *** does not impose itself upon those to follow in succeeding years"); *Manigault v. Springs*, 199 U.S. 473, 487 (1905); *Newton v. Commissioners*, 100 U.S. 548, 559, 25 L. Ed. 710 (1880) (in cases involving "public interests" and "public laws," "there can be . . . no irrepealable law").

1. Parts of the FAA Inconsistent with Norris-LaGuardia are Repealed.

The 72ed Congress made clear its will to expressly "repeal[ ]" "[a]ll [previously enacted] acts or parts of acts in conflict with the provisions" of Norris-LaGuardia. Section 15, 29 U.S.C. § 115. Therefore, to the extent that the 1925 FAA is read to protect arbitration agreements that "interfere" with, or prohibit, the right of employees to engage in "concerted" judicial dispute resolution, the FAA was, to that extent, "repealed" by the 72ed Congress when it enacted Norris-LaGuardia in 1932. That repeal, unaddressed by either of Petitioners' Briefs, or by the Acting Solicitor General, effectively resolves the issue before this Court and requires affirmance.

Further, the 72ed Congress which passed Norris-LaGuardia recognized that courts "had reinterpreted federal statutes that Congress had not intended for use against the organizing activities of labor unions." *BE&K Constr. Co.*, 536 U.S. at 542 (concurring opinion). To affect the congressional intent and protect against any such judicial "reinterpretation" which could construe an earlier statute to be in "conflict" with Norris-LaGuardia, Congress phrased the language of repeal in broad general terms to cover any then existing conflict, and any later "reinterpretation" of a statute to create a conflict. Under that language, should any court find any conflict between an earlier statute and Norris-LaGuardia, as Petitioners urge this Court to find with respect to the FAA, Congress was clear that the earlier statute is repealed.

We suspect when Petitioners finally address Norris-LaGuardia's express repeal, they will raise a variation of the argument they raise as to the NLRA: this Court's arbitration jurisprudence requires an "express reference" to the FAA in order for repeal to be effective.[3] But that argument makes no legal or logical sense for two reasons. The first is found in the FAA itself, in the saving clause of Section 2. As pointed out above, the savings clause makes clear the intent of

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[3] Petitioners may also seek to rely upon *Boys Mkts., Inc. v. Retail Clerk's Union*, 398 U.S. 235 (1970) for the proposition that Norris-LaGuardia did not repeal the FAA. In *Boys Markets*, this Court upheld an injunction against a strike on the basis of a "no strike" agreement and arbitration clause in a Collective Bargaining Agreement. Norris-LaGuardia only applies to acts or parts of act that are "in conflict" with the public policy in Section 2 of that act. Allowing the employees' chosen representative, their duly elected union, to agree to a no strike clause and to arbitration is consistent with, and not "in conflict with," the rights protected by Section 2. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257.

Congress not to allow the FAA to supplant any statute declaring an arbitration agreement in whole or in part illegal. The second reason an enforceable "express reference" cannot apply is the constitutional limitation on the power of one session of Congress to limit the power of a later session of Congress as pointed out above. *See also, infra* at 48-49.

2. The NLRA Repealed Any Inconsistent Provision in the FAA by Implication.

For the same reasons, the NLRA has repealed the inconsistent terms of the FAA by necessary implication. Petitioners and the Acting Solicitor General correctly interpret this Court's precedent to require harmonizing allegedly conflicting federal statutes wherever possible. Courts "are not at liberty to pick and choose among congressional enactments and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

However, when Petitioners and the Acting Solicitor General claim to apply the "harmonization" standard to the FAA and Section 7 of the NLRA, what they refer to as "harmonizing" is disregarding the NLRA, and choosing to enforce the FAA instead. Where an arbitration agreement's "terms" prohibits any collective or class proceedings, there is a clear and unavoidable conflict between the FAA mandated enforcement of those "terms," and the NLRA's mandated illegality of any "interference" with and employee's right to engage in "concerted activities." It is impossible to have it both ways. One statute must take precedence over the other.

Epic Petitioners quote *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936) to support "'[t]he cardinal rule that 'repeals by implication are not favored.'" *Epic* Br. 14, *accord*, Pet. Br. 21. But both the quotation and the analysis stop too soon. The *Posadas* Court continued to state: "There are two well-settled categories of repeal by implication." The relevant "settled categor[y]" is that "where provisions in . . . two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one." *Id., quoted in, Radzanower*, 426 U.S. at 154. "When a statute specifically permits what an earlier statute prohibited, or prohibits what it permitted, the earlier statute is (no doubt about it) impliedly repealed." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012). In such a case, like this one, the intention to repeal is "clear and manifest."

Epic Petitioners cite *Radzanower* for the proposition that the specific statute governs the more general. *Epic* Br. 54. They then claim that the FAA is "more specific" because it did "address" employment agreements. *Id.* at 55. The argument is illogical and wrong. The only manner in which the FAA "addressed" employment agreements was to exclude specific employment agreements from the reach of the statute, and not to legislate with respect to them. *See* 9 U.S.C. § 1. The FAA never addressed the specific terms of employment agreements. The NLRA did and is therefore more specific.

Even if the more specific statute canon favored the FAA, the last-in-time canon is generally the most important rule of construction. The last-in-time canon is the "tie-breaker" that resolves all issues when other canons point in other directions. William N. Eskridge Jr. *Interpreting Law: A Primer on How to Read*

Statute and the Constitution. (2016), at 136. Given the Constitutional limitation that one session of Congress cannot diminish the effect later legislation, the rule could not be otherwise.

It is not "plausible," in truth it is hardly conceivable, that Congress could have intended to allow an employer to defeat the right to collective litigation through an employer drafted contractual prohibition coercively imposed on individuals as a condition of employment. That supposed intent is inconsistent with congressional protection of the employees' rights to collectively complain, or to collectively strike. It is inconsistent with congressional protection of an employee from employer interference at every step of enforcement of the NLRA by the Board. It is inconsistent with the prohibition of retaliation for filing a collective suit. It is inconsistent with prior and subsequent labor legislation.

While "repeal by implication is disfavored, so is failure to give a later-enacted statute the full scope that its terms require." *Branch v. Smith*, 538 U.S. 254, 305 (2003) (O'Connor, J. joined by Thomas, J., concurring in part and dissenting in part). If the FAA contradicts the NLRA, "the full scope" of the NLRA requires that the FAA be found to have been partially repealed.

3. The Decision Below "Harmonized" the FAA With the NLRA as this Court's Precedent Requires.

The NLRA can be read in perfect harmony with the FAA, and the decision below did just that. Notwithstanding the NLRA, where an employee has an individual dispute that he or she seeks to resolve individually, as was the case in *Gilmer*, 500 U.S. 20, "individual attempts at conciliation" or resolution may

still be pursued in arbitration. *Id.* at 32. Individual arbitration may not be compelled if the employee wishes to assert his or her right to resolve his or her claims in "concerted" litigation, even where an employment contract purports to waive that right. An employer may not "interfere" with the employees' exercise of that right, or "coerce" an employee into waiving that right, by prohibiting the exercise of that right in a contract entered into as a condition of employment.

Similarly, class or collective arbitration of employment disputes, may not be compelled if the employer has not clearly agreed to it. *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 687 (2010). For those reasons, the Ninth Circuit remanded to the District Court to determine whether the severability clause of the EY Arbitration Agreement resolved the issue of whether the parties had agreed to collective arbitration. In *Epic*, such a remand was unnecessary because the contract precluded arbitration if the "concerted" action waiver was held unenforceable.

The decisions below followed the harmonizing approach and remanded for resolution of the issue of whether the contract between the parties required Respondents' claims to be arbitrated on a class or collective basis.

III. ARBITRATION AGREEMENTS BARRED BY NORRIS-LAGUARDIA AND THE NLRA ARE NOT RENDERED LAWFUL BY THIS COURT'S ARBITRATION JURISPRUDENCE.

The language, purpose, and legislative history of the three statutes involved point inexorably to the conclusion that the contractual "concerted" litigation ban is illegal (under the NLRA) and unenforceable

(under Norris-LaGuardia) and the FAA has been repealed to that extent.

Petitioners argue, however, that this Court's arbitration jurisprudence has effectively amended the statutory language of the FAA. Petitioners claim no subsequent federal legislation may contain terms that conflict with the FAA, or adversely impacts arbitration, without a "clear congressional command." They suggest that "command" must contain an explicit reference to the FAA, or to arbitration or include collective or class proceedings. *See* Pet. Br. 15, 19, 25; *Epic* Br. 30, 33. That requirement is nowhere found in the text or the legislative history of the FAA. As we point out below, we believe this argument is a distortion of this Court's opinions, as the following review of those decisions shows.

The modern era of this Court's arbitration jurisprudence begins with *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985). There, an automobile manufacturer sought to compel arbitration of a variety of claims, including an anti-trust claim against its distributor. This Court found "no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims." *Id.* at 625. That decision called into question the Court's holding in *Wilko v. Swan*, 346 U.S. 427, 438 (1953), which found that claims under Section 12(2) of the Securities Act of 1933 were not arbitrable.

After *Mitsubishi*, the Court addressed the arbitrability of claims under a number of federal statutes. Each case found that arbitration of those statutory claims was permitted. *See e.g.,. McMahon*, 482 U.S. at 226, (Securities Act of 1934), *Rodriguez de QuiJ.A.s v. Shearson/American Express, Inc.*, 490 U.S. 477, 480-484 (1989)(Securities Act of 1933, overruling

Wilko, 346 U.S. 427.); and *CompuCredit Corp.*, 565 U.S. 95 (Credit Repair Organization Act). The "clear congressional command" language and the alleged requirement of an explicit reference to the FAA are drawn exclusively from those cases.[4]

Where it is claimed that Congress intended to prohibit waiver of a judicial forum for a particular statutory claim, it makes sense to expect Congress to make clear its intent through a "clear congressional command." Absent such clarity, "judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals' [could] inhibit enforcement of the [Federal Arbitration] Act in controversies based on statutes." *McMahon*, 482 U.S. at 226, *quoting*, *Mitsubishi Motors Corp.*, 473 U.S. at 626-627, *and Wilko*, 346 U.S. at 432. (internal quotations omitted).

By contrast, this Court's precedent has always recognized that ***a term*** in an arbitration agreement may be unlawful and unenforceable if it requires a party to "forgo *** the substantive protection afforded by a given statute ***." *Mitsubishi Motors Corp.*, 473 U.S. at 628; *accord, Gilmer,* 500 U.S. at 26.

Moreover, the issue is not only whether a substantive right is being contractually prohibited. Illegality is a separate ground for denying enforcement. There is "no doubt that illegal promises ***will not be enforced*** ***." *Kaiser Steel Corp.*, 455 U.S. at 77 (emphasis supplied). *See also, W. R. Grace & Co.*, 461 U.S. at 766 (1983 (citations omitted) ("If the contract as interpreted by [the arbitrator] violates

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[4] *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013), discussed below, *infra* at 47-48, does use the phrase "congressional command," but could not be referring to the same type of "command" since at the time of passage of the anti-trust laws at issue there the FAA had not been passed.

some explicit public policy, we are obliged to refrain from enforcing it.").

This Court has never held that the "clear congressional command" rule should be applied to a statute that makes certain contract terms illegal. In all events, if any heightened "clarity" is required by this Court's precedents, a statute declaring contractual terms illegal is as clear a "congressional command" as can be imagined. Contract terms which are illegal and unenforceable do not magically become legal and enforceable by being included in an arbitration clause. Pet. 23a. An employer may not "simply incant the acronym 'FAA' and receive protection for illegal contract terms." *Id.*

It makes perfect sense that FAA does not require special rules to make contract terms in arbitration agreements illegal. Congress, or, indeed the Constitution, might create illegality for many different reasons, and in many different ways, without giving a single thought to the impact of that illegality on an arbitration agreement. An agreement between merchants might contain an arbitration agreement with terms "in restraint of trade" that are unlawful under the anti-trust laws. 15 U.S.C. § 1. In conflict with laws providing for administrative remedies for statutory violations, an arbitration agreement might prohibit complaints from being filed with the relevant agencies. Similarly, Constitutional Due Process rights and statutory substantive rights might be impaired by a term in an arbitration agreement.

Contrary to the arguments of Petitoners and the Acting Solicitor General, in declaring conduct "illegal" Congress need not have addressed whether employers might try to craft an arbitration agreement that would allow evasion of congressionally declared illegality. None of the cases cited by petitioners or the Acting

Solicitor General place any limitation on the ability of Congress to outlaw a term in an arbitration agreement.[5]

Italian Colors, 133 S. Ct. 2304, which *Epic* Petitioners claim is "dispositive," *Epic* Br. 31, does not support the arguments of Petitioners or the Acting Solicitor General. In *Italian Colors*, claimants alleged that the high cost of individual arbitration of their case under the anti-trust laws, eliminated an "affordable procedural path to the vindication of" claimant's anti-trust claims. This Court found the anti-trust laws created a ***right to pursue judicial*** procedures, but did not "***guarantee an affordable procedural path to the vindication***" of statutory claims. *Id.* at 2309.

This case arises because Congress established the right of employees ***to pursue*** litigation collectively. As

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[5] *See e.g.*, **cases addressing enforceability of an arbitration agreement in unrelated context**: *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-521 (1974) (cited Pet. Br. 22)(Wilko rule inapposite to international contract dispute subject to arbitration before the International Chamber of Commerce in Paris, arbitration enforced); *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 90-92 (2000) (cited Pet. Br. 22)(Silence of arbitration agreement on who is to bear costs does not invalidate agreement.); **cases addressing individual employment claims**: *Circuit City Stores v. Adams*, 532 U.S. 105, 110, 118-19 (2001)(Individual discrimination claim by employee); *Gilmer*, 500 U.S. 20, 23, 26-27 (Individual claim under ADEA); **cases addressing preempted state laws or preempted state court rulings**: *E.g., Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984)(California Franchise Investment Law, barring arbitration of franchise related disputes violates the Supremacy Clause); *AT&T Mobility LLC*, 563 U.S. at 351 (state Supreme Court rule requiring class-wide arbitration of specified group of consumer claims, preempted by FAA.); *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (FAA preempts any state rule discriminating on its face against arbitration disfavoring contracts with the defining features of arbitration agreements).

in *Italian Colors,* there is no guarantee that collective litigation will be affordable, or successful. And just as with the anti-trust laws where Congress enacted a treble-damage remedy to "facilitate" litigation under that Act, *id.*, in the NLRA Congress enacted the protections on "concerted activities" to facilitate the congressional goal of remediating unequal bargaining power between employers and employees and thus to promote industrial peace.

"The illegality of the 'separate proceedings' term here has nothing to do with arbitration as a forum ***. The problem with the contract at issue is not that it requires arbitration; it is that the contract term defeats a substantive federal right to pursue concerted work-related legal claims." Decision below, Pet. at 13a-14a. Congress intended to outlaw any interference with an employee's right to engage in "concerted" litigation. This Court's precedents require enforcement, not disregard, of that congressional intent.

Moreover, as recognized by this Court in cases going back to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) and the common law of England before the founding of the Republic, "one legislature," "cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation, can never be controverted." *Fletcher v. Peck*, 10 U.S. 87 (6 Cranch) (1810); *see also, Marbury,* 5 U.S. (1 Cranch) at 177 (unlike the Constitution, a legislative Act is "alterable when the legislature shall please to alter it"). As Blackstone memorably phrased it: "Acts of parliament derogatory from the power of subsequent parliaments bind not." 1 *W. Blackstone, Commentaries on the Laws of England* 90 (1765).

"Among the powers of a legislature that a prior legislature cannot abridge is, of course, the power to

make its will known in whatever fashion it deems appropriate—including the repeal of pre-existing provisions by simply and clearly contradicting them." *Lockhart*, 546 U.S. at 148. (Scalia, J. concurring with unanimous court).

Therefore, even a congressionally enacted "express-statement" requirement "'cannot justify a disregard of the will of Congress as manifested either expressly or by necessary implication in a subsequent enactment.' A subsequent Congress *** may exempt itself from such requirements by 'fair implication'—that is, without an express statement." *Id.* (emphasis in the original), *quoting Great Northern R. Co. v. United States*, 208 U.S. 452, 465 (1908), *and citing, Warden v. Marrero*, 417 U.S. 653, 659-660, n. 10, (1974), *and Hertz v. Woodman*, 218 U.S. 205, 218 (1910).

This Court applied that rule to a subsequent legislative modification of the Administrative Procedure Act ("APA") in *Marcello v. Bonds*, 349 U.S. 302, 310 (1955). Section 12 of the APA provides that "[n]o subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly." Nonetheless, this Court held that it would not "require the Congress to employ magical passwords" in order pass superseding legislation. *Id.* at 310.

Since Congress did not have the power to include an enforceable "express statement" requirement in the FAA, this Court's power under Article III does not allow it to imbue the FAA with a force and effect greater than Congress itself could create. The absence of an "express reference" to the FAA in Norris-LaGuardia does not diminish the effect of the express repeal, of any "acts or parts of acts" inconsistent with provisions of Norris-LaGuardia, and that includes any conflicting, provision in the FAA.

IV. SUGGESTION OF A LIMITATION ON THE JURISDICTION OF THIS COURT TO COMPEL INDIVIDUAL ARBITRATION.

The limitation on the remedies available in federal courts under Norris-LaGuardia was raised by Respondents below but never ruled upon.

Norris-LaGuardia has two sections which deprive federal courts of jurisdiction to enter an order enforcing the EY Arbitration Agreement or to compel Respondents to engage in individual arbitration. Section 3 of Norris-Laguardia provides that "[a]ny *** undertaking or promise in conflict with the public policy declared in section 2 of this Act, *** shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court***." 29 U.S.C. § 103.

The public policy declared in Section 2 of Norris-LaGuardia provides the same right to engage in "other concerted activities for *** mutual aid or protection" that is contained in Section 7 of the NLRA. *Compare,* 29 U.S.C. § 102 *and* 29 U.S.C. § 157.

Additionally, Section 4 of Norris-LaGuardia provides that "[n]o court of the United States shall have jurisdiction to *** prohibit any person or persons participating or interested in [a labor] dispute *** from *** aiding any person participating *** in any action or suit in any court of the United States or of any State. 29 U.S.C. § 104.

This Court has interpreted Section 4 to be "facially a limitation upon the relief that can be accorded, not a removal of jurisdiction over 'any case involving or growing out of a labor dispute.'" *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 469-70 (2007). Section 3 is also, on its face, "a limitation upon the relief that can be accorded."

Should the Court conclude, as Petitioners and the Acting Solicitor General argue, that the EY Arbitration Agreement is enforceable according to its terms, we respectfully suggest that this case should be remanded to the Ninth Circuit to address the issue of the jurisdiction of federal courts to provide the relief Petitioners seek.

CONCLUSION

The right of an employee to sue to enforce legal rights being violated by their employer is an essential right. The right to pursue such litigation on a collective or class basis is a valuable counterbalance to the unequal bargaining power of employers and is protected by the NLRA and Norris-LaGuardia. Section 2 of the FAA demonstrates that Congress never intended misuse of the FAA to require enforcement of agreements that Congress has declared illegal and unenforceable. To hold otherwise is to encourage unlawful underpayment of wages, and underpayment of taxes.

It is unsurprising that employers would wish to accomplish that result. But it would take a disregard of the will of Congress to accomplish it.

Dated: New York, New York
August 9, 2017

Respectfully Submitted,
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ADDENDUM

ADDITIONAL STATUTORY PROVISIONS INVOLVED

Section 2 of the Norris-LaGuardia Act ("Norris-LaGuardia") provides in relevant part:

> [T]he public policy of the United States is hereby declared as follows:
>
> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

29 U.S.C. §102.

Section 3 of Norris LaGuardia provides in relevant part:

> Any...undertaking or promise in conflict with the public policy declared in section 2 of this Act, is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court...

29 U.S.C. § 103.

Section 4 of Norris LaGuardia provides in relevant part:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State

29 U.S.C. § 104.

RECORD
AND
BRIEF

No. 16-300

IN THE

Supreme Court of the United States

ERNST & YOUNG LLP and ERNST & YOUNG U.S. LLP,

Petitioners,

—v.—

STEPHEN MORRIS and KELLY MCDANIEL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS IN SUPPORT OF PETITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether Sections 7 and 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §§157, 158, which establish a statutory right for employees to "engage in ... concerted activities for the purpose of ... mutual aid or protection," render unlawful a term of an arbitration agreement that requires arbitration of an employee's work related disputes to be conducted individually and in "separate proceedings."

2. Whether Section 2 of the Norris-LaGuardia Act, 29 U.S.C. §102, taken together with Section 3 of the Norris-LaGuardia Act, 29 U.S.C. §103, removes the jurisdiction of courts of the United States to enforce the contractual term referred to above.

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ADDITIONAL STATUTORY PROVISIONS INVOLVED

Section 2 of the NLGA provides:

> In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:
>
> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

29 U.S.C. §102.

Section 3 of the NLGA provides:

> Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 102 of this title, is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court.

29 U.S.C. §103.

Section 15 of the NLGA provides:

> All acts and parts of acts in conflict with the provisions of this chapter are repealed.

29 U.S.C. §115.

STATEMENT OF THE CASE

This Court now has the opportunity to resolve whether a contractual term barring employees from seeking legal redress through "concerted activity," a term which is unlawful under the National Labor Relations Act ("NLRA"), must be enforced if it is included in an arbitration agreement. The issue of the interplay of the Federal Arbitration Act ("FAA") and the NLRA in such cases has bedeviled the lower courts, deeply split the Circuits as illustrated by four pending petitions for certiorari, and left employees and employers in unacceptable uncertainty as to how employment disputes are to be resolved.

This case illustrates the wisdom of Congress in enacting the NLGA and the NLRA, and protecting worker's right to engage in "concerted activities" for

their "mutual aid and protection."[1] Absent a right to collectively pursue employment related disputes, statutorily guaranteed employee rights can be easily evaded. This case also uniquely presents all of the questions this Court must address on review. There is well developed reasoning and a robust dissent in the Court of Appeals below. The remedy imposed by the Ninth Circuit which is unique among the four cases for which petitions have been filed, also deserves consideration by this Court. The Ninth Circuit invalidated the term of the arbitration agreement that is prohibited by the NLRA, but remanded to the District Court to determine the severability of that clause under the terms of the parties' contract. Respondents believe this case is therefore the best vehicle for the Court's review of the issues presented.[2] For those reasons, among others, Respondents support Petitioners' petition for certiorari.

Respondents are two of approximately 40,000 employees of Petitioners. They allege that many thousands of employees, perhaps tens of thousands of employees, were and are unlawfully misclassified as exempt from receiving statutorily required overtime payments. Those employees were and continue to be denied overtime payments and other payments to which they are entitled under Federal and State Labor Laws.

Respondents' claims and earlier actions by other similarly misclassified employees of Petitioners, have

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[1] *See*, 29 U.S.C. §§102, 103, 157, 158.

[2] We believe that certiorari also should be granted to National Labor Relations Board ("NLRB") in *NLRB v. Murphy Oil*, No. 16-307. The special expertise of the Board and the Solicitor General will undoubtedly be of substantial assistance to the Court.

been in the courts for over a decade.[3] None of those claims were addressed on the merits because of the prohibition on "concerted activities" in Petitioners' arbitration agreements.[4] As a result, perhaps as many as 100,000 or more employees were denied the opportunity to have their statutory rights adjudicated over the last decade. Federal law, if properly read, protects employees from such inequitable results.

Section 7 of the NLRA protects the right of employees to engage in "concerted activities" to address workplace grievances. Section 8 renders unlawful any "interfere[nce]" or "restrain[t]" of that right. This Court, and several Circuits, recognize that the right to engage in "concerted activities" includes the right to pursue legal redress collectively. 3a, 7a.[5] *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566, (1978). However, as a condition of their employment, Respondents were required to agree to arbitrate all employment disputes. The arbitration agreement contained a term (the "Separate Proceedings Clause") that requires employees to arbitrate their employment disputes only individually and only in "separate proceedings." 2a.

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[3] *See, Richards v. Ernst & Young, LLP*, 744 F.3d 1072 (9th Cir. 2013), cert. denied, 2014 U.S. LEXIS 6848 (individual arbitration ordered), *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013)(individual arbitration ordered); *Ho v. Ernst & Young LLP*, No. C-05-04867 RMW, 2012 U.S. Dist. LEXIS 3524, at *2 (N.D. Cal. Jan. 11, 2012)(*consolidated with Richards, still pending*).

[4] In *Sutherland*, to "effectively vindicate" her claims in an individual arbitration, "[Plaintiff] would be required to expend approximately $200,000 to recover less than $2,000." *Sutherland v. Ernst & Young LLP, supra.*, 726 F.3d at 295.

[5] References to the appendices annexed to the Petition are cited "____a" with appropriate page references.

In its decision below, the Court of Appeals found the Separate Proceedings Clause to be unlawful under the plain meaning of the Sections 7 and 8 of the NLRA. 10a, 11a. The same finding of illegality was compelled as a matter of law under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 & n.9 (1984) and *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992).

The National Labor Relations Board (the "NLRB" or the "Board"), the agency with authority to enforce the NLRA, "has interpreted Sections 7 and 8 to prohibit employers from making agreements with individual employees barring access to class or collective remedies. *See D.R. Horton*, 357 N.L.R.B. No. 184, at *5, 357 N.L.R.B. 2277, at 2280. The Board's interpretations of ambiguous provisions of the NLRA are 'entitled to judicial deference.'" *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1153 (7th Cir. 2016)(additional citations omitted).

Petitioners, the Dissent below, and a chorus of amici, argue that this Court's "arbitration jurisprudence" requires the courts to "rigorously enforce" the arbitration agreement "in accordance with its terms." *See* Pet. at 18. By "arbitration jurisprudence" Petitioners and their allies mean the constellation of cases decided over the past thirty years that have upheld enforcement of arbitration clauses over various objections in varying contexts. The overly simple conclusion they reach from this variety of disparate cases is that an arbitration clause always prevails as written.

The sole exception Petitioners and their allies find, is where there is a "contrary congressional command" in a statute. That command must explicitly refer to the FAA or arbitration in order to

negate the arbitration right established in the FAA. In the absence of such a "contrary congressional command" in the NLRA, Petitioners and the Dissent below argue that this Court's "arbitration jurisprudence" demands that the arbitration agreement's terms be enforced, irrespective of illegality under the NLRA. Pet. at 16-17.

The "savings clause" in FAA Section 2 denies enforcement of an arbitration agreement or term "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. Based on the "savings clause," Chief Judge Thomas found no conflict between the FAA and the NLRA, because illegality under federal law is a "ground for the revocation of any contract." 14a. Chief Judge Wood reached the same conclusion in *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1157 (7th Cir. 2016) (hereinafter *Epic*).

Petitioners and the Dissent reject that analysis. They claim that under this Court's "arbitration jurisprudence" this Court "does not apply the saving clause to federal statutes." 39a, Pet. at 9. This Court has never adopted such a rule. Rather, this Court recognizes that "Congress rather than the courts controls the availability of remedies for violations of statutes." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165, (2008), *quoting, Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509, n. 9, (1990) (internal citations omitted). That iron clad requirement embodied in the Separation of Powers doctrine cannot be overcome by this Court's policy judgments with respect to arbitration. We do not believe that this Court intended such a result.

Nor is it true, as Petitioners, the Dissent below, and the amici argue, "that Congress must speak ...

explicitly in order to convey its intent to preclude arbitration of statutory claims. [The Court] never said as much, and on numerous occasions [the Court] held that proof of Congress' intent may also be discovered in the history or purpose of the statute in question." *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 109 (2012)(Sotomayer, J., concurring).

Under standard statutory construction and analysis of potential conflicts between two federal statutes, the FAA and the NLRA are easily harmonized. The NLRA renders the Separate Proceedings Clause unlawful, and the savings clause in the FAA ***precludes enforcement of that clause***. Not enforcing that one clause does not render the arbitration agreement unenforceable as a whole unless the arbitration contract's severability clause requires that result. In the decision below, the Court of Appeals remanded to the District Court for a determination of whether the contract provides for the arbitration clause to survive. 24a.

The Court of Appeals' decision is in perfect harmony with the requirements of both the FAA and the NLRA. Accordingly we respectfully believe that the decision of the Court of Appeal should be affirmed.

However, if instead the reasoning of the Dissent is adopted, that would directly raise the question of whether the courts of the United States have jurisdiction to enforce a contract that restricts the right of employees to "engage in ... concerted activities for the purpose of ... mutual aid or protection." Section 2 of the Norris-LaGuardia Act, 29 U.S.C. §102, taken together with Section 3 of the Norris-LaGuardia Act, 29 U.S.C. §103, eliminates the

jurisdiction of courts of the United States to enforce such a contractual term.

THE REASONS FOR GRANTING THE WRIT

A. The Issues Presented By This Case Are Exceptionally Important.

The unusual circumstance of the pendency of four petitions from four separate conflicting Circuit Court opinions, all filed within days of each other, show a deep conflict between the Circuits[6], and the exceptional importance of the issues presented by this petition to the Ninth Circuit Court of Appeals. *See NLRB v. Murphy Oil*, No. 16-307 (petition to the Fifth Circuit filed Sept. 9, 2016 by Solicitor General on behalf of NLRB); *Epic Sys. Corp. v. Lewis*, No. 16-285 (petition to the Seventh Circuit filed Sept. 2, 2016 by employer); *Patterson v. Raymours Furniture Company, Inc.* No. 16-388 (petition to the Second Circuit filed Sept. 26, 2016 by employee). In *Raymours,* the panel members noted conflicting persuasive authority, but felt bound by the Second Circuit's earlier opinion in *Sutherland. Patterson v. Raymours Furniture Company, Inc.*, 2016 U.S. App. LEXIS 16240, at *5 (2d Cir. Sep. 2, 2016). In *SF Markets v. NLRB*, Case No. 16-60186 (5th Cir. Order

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[6] *Compare* **Ninth Circuit**: *Morris v. Ernst & Young LLP*, 1a, *and* **Seventh Circuit**: *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *with* **Eighth Circuit**: *Owen v. BristolCare, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772 (8th Cir. 2016), **Fifth Circuit**: *Murphy Oil v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), *D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013), *and* **Second Circuit**: *Sutherland v. Ernst & Young*, 726 F.3d 290 (2d Cir. 2013), *Patterson v. Raymours Furniture Company, Inc.*, 726 F.3d 290 (2d Cir. 2016).

of July 26, 2016), Judge Dennis "urge[d]" the Fifth Circuit to "reconsider this issue *en banc*."

Successive *en banc* applications with uncertain results will not resolve the conflict with the urgency this issue requires. *En banc* applications may not resolve the conflict at all. In addition, the numerous pending cases raising the same issues and numerous amicus briefs all attest to the extreme importance of the issues presented.

B. The Decision Below Was Correct. The "Mode Of Analysis" Urged By The Dissent Below, The Petitioners, And The Amici, Conflicts with This Court's Precedents.

The decision of the Court of Appeal below is clearly correct. First, it is hard to conclude that the Separate Proceedings Clause is lawful. The Separate Proceedings Clause requires arbitration of employment disputes. It mandates that employees arbitrate only as individuals and in "separate proceedings." On its face, that clause prohibits "concerted activity" in arbitration of an employment dispute. "Concerted activities" in furtherance of resolution of employment grievances are protected by Section 7 of the NLRA. Under Section 8 of the NLRA it is unlawful to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in Section 7.

Were there any doubt, and Chief Judge Thomas correctly concluded there is not, 10a, the Separate Proceedings Clause must still fail as unlawful. The NLRB has forcefully and repeatedly interpreted Section 7 as rendering unlawful any term in an employment contract that prohibits concerted legal

action. *See, Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1153 (7th Cir. 2016). The NLRB's ruling is entitled to deference. *Id., see, also, Lechmere, supra.* 502 U.S. at 536; *NLRB v. United Food & Commercial Workers Union, Local 23, AFL-CIO*, 484 U.S. 112, 123 (1987); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1054 (8th Cir. 2013), *citing, Delock v. Securitas Sec. Servs. USA*, 883 F. Supp. 2d 784 (E.D. Ark. 2012); *D.R. Horton v. NLRB*, 737 F.3d 344, 356 (5th Cir. 2013).

Therefore, the issue of the illegality of the Separate Proceedings Clause is settled, either as a matter of the plain meaning of the statute or as a matter of deference.

"The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in ... federal statutes. ... Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power." *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83-84 (1982), *citing. Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948).

In this case, the Petitioners, and the Dissent below seek to apply a rule that was developed for cases where it was claimed that "Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim." *Shearson/Am. Express v. McMahon*, 482 U.S. 220, (1987). *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012) is an example of such a case, as are *Shearson/Am. Express v. McMahon*, and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

In such cases it makes perfect sense to expect Congress to make clear its intent through a clear

"contrary congressional command." Absent such clarity, "judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals [could] inhibit enforcement of the [Federal Arbitration] Act in controversies based on statutes." *Shearson/Am. Express v. McMahon*, *supra.* 482 U.S. at 226, *quoting, Mitsubishi Motors Corp., supra.*. 473 U.S. at 626-627, *quoting Wilko v. Swan,* 346 U.S. 427, 432 (1953) (internal quotations omitted).

However, where it is not arbitration *per se*, but a ***term of the arbitration agreement*** that is alleged to be unlawful, this Court's precedent has taken a different approach and considered "whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628, 105 S. Ct. 3346, 3355 (1985). This Court's precedent recognizes that ***a term*** in an arbitration agreement may be unlawful and unenforceable. "That would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013).

Congress or the Constitution, might create such illegality for many different reasons and in many different ways. Illegal terms might, through clever draftsmanship, find their way into an arbitration agreement.

For example, an arbitration clause might prohibit complaints to be filed with federal agencies such as the NLRB or the Equal Employment Opportunity Commission, and require those disputes to be submitted first to arbitration. Suits under the False Claims Act by employees who are aware of their

employer's fraudulent practices could be required, by a cleverly drafted contract, to be submitted to arbitration.

In cases where a ***term of the arbitration agreement*** is alleged to be illegal, the only sensible way to commence an analysis of enforceability is to determine if there is illegality. It makes no sense to start by seeking to determine if there was a "contrary congressional command" with respect to non-arbitrability because arbitrability is not really the issue. As Chief Judge Thomas memorably phrased it:

> The illegality of the "separate proceedings" term here has nothing to do with arbitration as a forum. It would equally violate the NLRA for Ernst & Young to require its employees to sign a contract requiring the resolution of all work-related disputes in court and in "separate proceedings." The same infirmity would exist if the contract required disputes to be resolved through casting lots, coin toss, duel, trial by ordeal, or any other dispute resolution mechanism, if the contract (1) limited resolution to that mechanism and (2) required separate individual proceedings. The problem with the contract at issue is not that it requires arbitration; it is that the contract term defeats a substantive federal right to pursue concerted work-related legal claims.

13a-14a.

Contract terms that are illegal and unenforceable in every other context do not magically become legal and enforceable by being included in an arbitration agreement. To hold that they do would place the power to nullify an act of Congress in the hands of

the corporate lawyers who draft employers' arbitration agreements.

Unlike the case of arbitration forum prohibition statutes, Congress need not have given a single thought to arbitration when it enacted a statute that renders certain contract terms unlawful or unenforceable. That surely was the case when the NLRA was passed. At that time, the FAA excluded all labor contracts that were within the reach of Congress to regulate under the Commerce Clause. *See,* 9 U.S.C. §1.[7] A few years earlier, the Norris-LaGuardia Act specifically repealed any prior statutes (the FAA was a prior statute) that interfered with the right of workers to engage in "concerted activities." *See,* 29 U.S.C. §115.

When Petitioners raised the argument of a conflict between the FAA and the NLRA the Court of Appeals was right to begin with the issue of illegality rather than, as the Dissent argued, beginning with the question of whether there is a "contrary congressional command." The approach used by the Court of Appeal does not disregard or diminish any argument that the FAA conflicts with the NLRA.

Simply enforcing the FAA and disregarding the NLRA, as urged by the Dissent below and the Petitioners, and as held by the Second, Fifth, and Eighth Circuit cases, is completely contrary to this Court's precedents. Courts "may not pick and choose

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[7] It was not until 2001 that it was established that contracts of employment, other than those expressly excluded by Section 1, were covered by the FAA. *Circuit City Stores v. Adams*, 532 U.S. 105, 119 (2001); *see, also, Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 36-43 (1991) (Stevens, J. joined by Marshall, J. dissenting).

among congressional enactments. ..." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). "This Court has never refused to give effect to a duly passed federal statute absent a 'clear and manifest' Congressional intention to the contrary." *Id.* (citation omitted). "[S]o long as there is no positive repugnancy between two laws, such that enforcement of one would render ... the other wholly superfluous, a court must give effect to both." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992)(internal quotations and citations omitted).

The Court of Appeals was correct in determining that the savings clause in Section 2 of the FAA eliminates the conflict between the NLRA and the FAA with respect to the Separate Proceedings Clause. 12a-14a. The savings clause permits agreements to arbitrate to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (hereinafter "*Concepcion*"), *quoting, Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

As recognized in *Concepcion,* nothing in the Supreme Court's arbitration rulings undermines the statutory command in the FAA that generally applicable contract defenses, such as illegality under federal law are preserved by the savings clause in Section 2 of the FAA. *See, id.* at 343. (noting that Section 2 does not "preserve ***state-law rules*** that stand as an obstacle to the accomplishment of the FAA's objectives.") (emphasis supplied). Congress, unlike state legislatures or courts, has the right and the power to make certain contract terms illegal. When Congress choses to exercise that power, it is irrelevant whether that illegality "interfere[s] with

the fundamental attributes of arbitration." *Compare* 40a (Dissent).

The Court of Appeals was also correct in giving effect to both statutes, as this Court's precedent requires. The Court of Appeals correctly remanded to the District Court to determine if "there is a contractual basis for concluding that the part[ies] agreed" to "submit to class arbitration" in the event the Separate Proceedings Clause was invalidated. *See, Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684, 130 S. Ct. 1758, 1775 (2010).

The approach adopted by the Court of Appeals, unlike the other approaches urged on this Court, gives proper respect to the FAA, the NLRA, and the right of parties "to structure their arbitration agreements as they see fit." *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 57 (1995), *quoting, Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). For those reasons, the decision by the Court of Appeals is correct and should be affirmed.

C. Under The Plain Language Of The Norris-LaGuardia Act, The Courts Of The United States May Not Enter An Order Enforcing The Separate Proceedings Clause Or Compelling Individual Arbitration.

Since the conflict between the Separate Proceedings Clause and the NLRA was "determinative," the Court of Appeals below did not find it necessary to address enforcement of the Separate Proceedings Clause under the Norris-LaGuardia Act. 24a-25a. However, if this Court were to disagree with Chief Judge Thomas' reasoning about the scope of the savings clause in Section 2 of the FAA, then this Court must determine whether it

has jurisdiction to enforce the Separate Proceedings Clause under Section 3 of the Norris-LaGuardia Act. 29 U.S.C. §103.

The same language in the NLRA that protects "***concerted activities for*** the purpose of collective bargaining or other ***mutual aid or protection***", also protects the same "concerted activities" under the Norris-LaGuardia Act. *Compare* 29 U.S.C. §157 *with* 29 U.S.C. §102. This Court concluded that the right to engage in "concerted activities" under Section 7 of the NLRA includes the right to pursue legal redress collectively. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566, (1978). For the same reasons, that same right is protected under Section 2 of the Norris-LaGuardia Act.

Under the express terms of the Norris-LaGuardia Act, once the Court determines that proceeding collectively in arbitration or Court is a protected "concerted activity," the Court is not allowed to "weigh" the policies animating the FAA against the policies animating the Norris-LaGuardia Act, or "reconcile" any conflict found to exist.

The Norris-LaGuardia Act contains an express repeal of prior inconsistent statutes in Section 15. It states: "**Repeal of conflicting laws**. All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed." 29 U.S.C. §115. The FAA was passed in 1925, and the Norris-LaGuardia Act was passed in 1932. If the FAA conflicted with the Norris-LaGuardia Act, the parts of the FAA that were in conflict were repealed by Section 15.

Further, under the Norris-LaGuardia Act, any contract[8] containing a prohibited limitation on "concerted activities" by employees "shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court." 29 U.S.C. §103. Whether that limitation is "a limitation upon the relief that can be accorded," or "a removal of jurisdiction," *see, Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 470, 127 S. Ct. 1397, 1406 (2007), the inexorable result in either case is that neither this Court nor any court of the United States may enforce the Separate Proceedings Clause. Neither this Court nor any court of the United States may enter an order compelling the Respondents to arbitrate their employment disputes "individually" and in "separate proceedings."

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[8] "Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 2 of this Act..." 29 U.S.C. §103.

CONCLUSION

For all of the above reasons, Respondents respectfully request that this Court issue a writ of certiorari to review the judgment and opinion of the Ninth Circuit.

Dated: New York, New York
November 21, 2016

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In the Supreme Court of the United States

ERNST & YOUNG LLP, ET AL., PETITIONERS

v.

STEPHEN MORRIS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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REPLY BRIEF FOR THE PETITIONERS

The Court granted certiorari in these cases to resolve an alleged conflict between two federal statutes: the Federal Arbitration Act and the National Labor Relations Act. Yet one would hardly know it by reading the response briefs. According to the parties to those briefs (hereafter "respondents"), the Court need only interpret the NLRA "alone," "without any reference to" the Arbitration Act, in order "completely [to] resolve[]" the cases. Lewis Br. 34 (No. 16-285). Respondents consequently treat the Arbitration Act as an afterthought, relegating it to the back of their briefs.

That nearly exclusive focus on the NLRA may be understandable coming from the NLRB. But this Court has time and again made clear that federal courts should work to harmonize allegedly conflicting federal statutes unless Congress has clearly indicated that one should displace the other. In particular, the Court will not construe an ambiguous statute to conflict with a clear one when a reasonable, non-conflicting interpretation of the ambiguous statute is available.

Respondents seek to avoid that principle because they so clearly lose under it. There can be no dispute that Section 2 of the Arbitration Act contains a clear command to enforce arbitration provisions according to their terms—including, as this Court has repeatedly held, terms calling for individual arbitration. In light of that clarity, the Arbitration Act will yield to another federal statute only if the competing statute contains a similarly clear command precluding enforcement of the parties' agreement. This Court has repeatedly held that statutes that make ambiguous references to judicial proceedings or collective actions do not suffice. The NLRA contains no such clear congressional command; the Arbitration Act and this Court's cases thus mandate enforcement of the arbitration provisions at issue.

Respondents' attempts to avoid that well-established standard defy the plain language of the Arbitration Act and this Court's case law addressing similar alleged conflicts. But even if the NLRA were considered in isolation—which it decidedly should not be—it is best understood as leaving arbitration agreements and court rules for collective actions undisturbed, and as permitting covered employees to waive access to collective-litigation procedures and to agree to individual arbitration. The Ninth Circuit's decision invalidating the arbitration pro-

vision at issue here was incorrect, and its judgment should be reversed.

A. A Federal Statute Cannot Override The Arbitration Act's Clear Command To Enforce Arbitration Agreements According To Their Terms Unless It Contains A Clear Contrary Command

When a party asserts that a federal statute precludes enforcement of an arbitration agreement under the Arbitration Act, this Court asks whether the competing statute contains a clear congressional command contrary to the Arbitration Act's mandate to enforce arbitration agreements according to their terms. Given the deep-seated judicial hostility to arbitration, this Court has had no shortage of opportunities to make its methodology clear. See EY Br. 22-26 (No. 16-300) (citing cases). Respondents ignore that phalanx of authority and urge the Court to focus on the NLRA and the Arbitration Act's saving clause. But respondents offer no valid basis for the Court to abandon its well-established approach.

1. Like the court of appeals below, respondents suggest that the arbitration provisions here are unenforceable under the saving clause in Section 2 of the Arbitration Act because they are illegal under Section 7 of the NLRA. See Morris Br. 35-37 (No. 16-300); NLRB Br. 35-46 (No. 16-307); Lewis Br. 35-44 (No. 16-285); Hobson Br. 34-43 (No. 16-307). But every one of this Court's cases applying the clear-congressional-command standard could have been resolved by deeming the arbitration provision at issue illegal under the competing federal statute and then employing the saving clause to defeat arbitration. This Court has instead adhered to its traditional methodology and favored arbitration.

Even beyond that fatal defect, respondents have little answer for the proposition that, by its terms, the saving clause refers only to generally applicable defenses under

contract law: that is, "grounds * * * for the revocation of *any* contract." 9 U.S.C. 2 (emphasis added). Nor do respondents dispute that the saving clause has been understood by the Court not to provide the key for reconciling competing federal statutes, but to address state law, which ordinarily provides the rule of decision for contract cases and thus supplies those defenses. See EY Br. 33-37; U.S. Br. 29-33. The arguments respondents do make concerning the saving clause are unavailing.

a. Respondents note that saving clauses can sometimes cover federal law, whether explicitly or implicitly. See Morris Br. 36-37; NLRB Br. 44-45; Lewis Br. 38; Hobson Br. 40-41. That is surely true. For example, the "saving clause" at issue in *TC Heartland LLC* v. *Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017), stated that certain provisions in the general venue statute do not apply when "otherwise provided by law." *Id.* at 1521 (quoting 28 U.S.C. 1391(a)). Only federal law could "otherwise provide[]" under that statute, because federal law governs venue in federal court. See *Stewart Organization, Inc.* v. *Ricoh Corp.*, 487 U.S. 22, 25-32 (1988).

But saving clauses can also address only state law. And the relevant question is whether *this* saving clause can be triggered by a federal law such as the NLRA. That analysis naturally turns on the language and context of the clause itself. Here, the Arbitration Act's saving clause saves generally applicable contract defenses. State law provides the substance of contract law (except in rare circumstances) and thus supplies the types of generally applicable defenses the saving clause covers.

b. Perhaps recognizing the textual difficulty with respondents' argument, respondent Lewis suggests that he can accomplish in two steps what he could not accomplish in one. He argues that respondents can invoke the generally applicable state-law defense of illegality for

contracts that violate public policy and then have a federal statute supply that public policy via the Supremacy Clause. See Lewis Br. 37-38 n.7.

That argument is too clever by half. It is true that, under the Supremacy Clause, state courts must apply federal law when it establishes a rule of decision that conflicts with state law. See *Testa* v. *Katt*, 330 U.S. 386, 393-394 (1947). But it does not follow that federal law supplies the content for a state-law illegality defense; the Supremacy Clause provides only that federal law *preempts* state law in the event of a conflict. See *Armstrong* v. *Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1383 (2015). State courts therefore must *apply* federal law in some circumstances, but that does not mean they are obligated to incorporate federal law into state public policy.

Accordingly, respondents cannot shoehorn their argument into the saving clause by reconceptualizing it as a state-law illegality defense. At bottom, they are still relying solely on federal law. Sanctioning such a maneuver would contradict this Court's well-established methodology and open the way for parties to circumvent the requirement of a clear congressional command. See EY Br. 35-36.

c. In addition, the NLRB contends that its interpretation of the NLRA triggers the saving clause because, so interpreted, the NLRA "is neutral with respect to arbitration." NLRB Br. 37-44. That contention does not solve the problem that the saving clause applies only to generally applicable defenses under contract law—and it is in any event incorrect.

This Court considered and rejected a similar notion of "neutrality" in *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011). The plaintiffs there argued that the state-law prohibition on waivers of class arbitration was

neutral with respect to arbitration because state law "prohibit[ed] waivers of class litigation as well." *Id.* at 341. The Court rejected that argument, explaining that "requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration." *Id.* at 344. The Court observed that, while state law permitted claimants to opt for individual arbitration, the availability of collective-litigation procedures would drive them away from it, because there would be "little incentive for lawyers to arbitrate on behalf of individuals" when they could litigate on behalf of a class and "reap far higher fees in the process." *Id.* at 347.

So too here. Respondents' interpretation of the NLRA would require the availability of some form of collective litigation if an employment agreement provided for individual arbitration. See NLRB Br. 42. The natural result would be more litigation and less arbitration—hardly a "neutral" approach. See *id.* at 37.

2. As respondents all but concede, this Court's case law uniformly points away from their novel proposal to use the saving clause to evade the requirement of a clear congressional command contrary to arbitration. See Morris Br. 44-46; NLRB Br. 47-51; Hobson Br. 49-51. Respondents nevertheless contend that this Court's cases requiring a clear congressional command are distinguishable. Respondents are mistaken.

a. Respondents first contend that "none of th[e] congressional-command cases involved an agreement that was illegal because it violated a federal statute." NLRB Br. 47; see Lewis Br. 41. But that is exactly backwards: *every one* of those cases involved an allegedly illegal agreement, in the sense that the agreement was allegedly contrary to public policy reflected in the competing federal statute. Put another way, the party seeking to avoid arbitration in each of those cases argued

that some federal statute evinced a policy that precluded enforcement of the arbitration agreement at issue.

For example, in *CompuCredit Corp.* v. *Greenwood*, 565 U.S. 95 (2012), the plaintiffs argued that the Credit Repair Organizations Act forbade waivers of access to a judicial forum. See *id.* at 99. Likewise, in *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220 (1987), the plaintiff argued that the Racketeer Influenced and Corrupt Organizations Act forbade such waivers. See *id.* at 240. In both cases, the Court could have analyzed whether the agreements were "illegal"—*i.e.*, contrary to public policy as expressed by federal law. Instead, in each case, the Court searched—in vain—for a clear congressional command contrary to arbitration. See *CompuCredit*, 565 U.S. at 98; *McMahon*, 482 U.S. at 226-227.

b. Respondents next contend that this Court has applied the clear-congressional-command standard only when the party opposing arbitration argued that Congress was precluding arbitration entirely, rather than precluding a particular term in the parties' arbitration agreement. See Morris Br. 45-46; NLRB Br. 48-49; Hobson Br. 49-50.

American Express Co. v. *Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), rebuts that contention. The plaintiffs there accepted that antitrust claims generally could be arbitrated but nonetheless argued that the class-action waiver in that case could not be validly enforced without undermining the antitrust laws. *Id.* at 2308. This Court thus analyzed the antitrust laws not to determine whether they precluded arbitration entirely, but rather whether they contained a "congressional command" "contrary" to "the waiver of *class* arbitration." *Id.* at 2309 (emphasis added). The Court concluded that they did not. *Id.* at 2310.

More broadly, it would make little sense to apply the clear-congressional-command standard only when a federal statute allegedly precludes arbitration entirely. As this Court has explained, the text of the Arbitration Act requires "courts [to] rigorously enforce arbitration agreements according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes and the rules under which that arbitration will be conducted." *Italian Colors*, 133 S. Ct. at 2309 (internal quotation marks, citations, and brackets omitted).

The procedural terms of arbitration often matter just as much as the fact of arbitration itself; after all, customization is one of the fundamental features of arbitration. See *AT&T Mobility*, 563 U.S. at 348-349. Altering those terms after the fact can undermine the parties' choice of arbitration just as much as denying arbitration altogether. See *id.* at 341-343. Applying the clear-congressional-command standard to the procedural terms the parties select honors Congress's adoption, through the Arbitration Act, of a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 24 (1983).

3. As an alternative to their reliance on the saving clause, respondents contend that, when an arbitration agreement requires a party prospectively to waive a "substantive" or "core" statutory right, the agreement is invalid. See Lewis Br. 44-47; Hobson Br. 43-49. That contention is unavailing.

As a preliminary matter, this Court has never squarely recognized an exception to the Arbitration Act's mandate where an arbitration provision either precludes a party from raising, or prevents a party from effectively vindicating, an underlying right. The idea of such an exception arose in dicta in a footnote, see *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S.

614, 637 n.19 (1985), and this Court has never invalidated an arbitration agreement on that basis, see *Italian Colors*, 133 S. Ct. at 2310 & n.2.

When the Court has discussed the possibility of such an exception, however, it has described it in narrow terms. In *Mitsubishi Motors*, where the idea first arose, the Court suggested that such an exception would apply to the waiver of a "statutory cause of action." 473 U.S. at 637. The Court has used similar terms in subsequent decisions. See, *e.g.*, *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 540 (1995); *Gilmer* v. *Insterstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991). So understood, such an "exception" would not really be an exception to the Arbitration Act's mandate at all. A contractual provision that precludes a party from pursuing (or effectively pursuing) its underlying claim has little to do with arbitration; it simply attempts to minimize one party's liability to another.

Regardless of how it is labeled, however, this Court has made clear that any prospective-waiver exception extends only to arbitration agreements that require the parties prospectively to waive the ability to assert a cause of action. That is not the case here. Respondents will be able to pursue their FLSA and state-law claims in arbitration, and no one has suggested otherwise. Respondents nevertheless insist that the NLRA precludes enforcement of the arbitration agreement as written (and that the agreement is in fact an unfair labor practice). Nothing in this Court's cases about prospective waivers of statutory causes of action suggests that another federal statute can have that dramatic effect absent a clear congressional command.

4. Respondents further contend that enforcing arbitration agreements according to their terms absent a clear contrary command in another federal statute would

lead to absurdities. Employers would be free, they say, to vary the terms of dispute resolution based on an employee's race, sex, or age. See NLRB Br. 51; Lewis Br. 54; Hobson Br. 50. And parties, they add, could enter into arbitration agreements that violate the antitrust laws with impunity. See Morris Br. 36; Lewis Br. 54.

Those arguments rest on a gross caricature of the clear-congressional-command standard. They assume that a federal statute must yield to the Arbitration Act unless it expressly precludes arbitration altogether. But this Court has already indicated that a federal statute can displace the Arbitration Act if it contains a clear command contrary to *the specific terms* of an arbitration agreement, see *Italian Colors*, 133 S. Ct. at 2309-2310, and no "magic words" are necessary, see *Gilmer*, 500 U.S. at 26. Respondents also assume a false equivalence between a federal statute that permits virtually any arbitration agreement as long as it is offered on a nondiscriminatory basis or is not a naked restraint on trade, and a statute that allegedly prohibits individual arbitration agreements for all employers subject to it. The clear-congressional-command standard allows the Court to draw sensible distinctions among statutes and contexts.

In each case, the relevant inquiry is whether another federal statute contains a clear contrary command that overrides the Arbitration Act's clear command to enforce arbitration agreements according to their terms. There is nothing anomalous about such an inquiry; it is how the reconciliation of potentially conflicting statutes normally works.

B. The NLRA Does Not Contain A Clear Contrary Command To Override The Arbitration Act

As in any other case in which the Arbitration Act allegedly conflicts with another federal statute, respondents bear the burden of showing that the NLRA contains a clear command contrary to the Arbitration Act's command to enforce arbitration agreements according to their terms—including terms that require individual, rather than collective, arbitration. Respondents make little effort to satisfy that standard or to reconcile the two statutes.

Instead, respondents argue at great length that the NLRA, viewed in isolation from the Arbitration Act, provides covered employees with a nonwaivable right to invoke collective-litigation procedures in employment-related disputes—creating, rather than resolving, a conflict between the two statutes. Respondents' effort to evade the applicable test is understandable. The relevant provisions of the NLRA do not address arbitration or contain any other hint of a conflict, let alone the clear contrary command this Court's cases require. And respondents' interpretation of the NLRA is in any event deeply flawed.

1. A federal statute will not displace the Arbitration Act's clear mandate to enforce arbitration agreements according to their terms unless Congress has expressed its intention to do so with "clarity." See *CompuCredit*, 565 U.S. at 103. Courts will thus compel arbitration whenever the arguments concerning the interpretation of the other federal statute are "in equipoise." *Id.* at 109 (Sotomayor, J., concurring in the judgment). Consistent with that standard, "any doubts * * * should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25.

While this Court has repeatedly applied that standard in the specific context of arbitration, it is not unique to it. Whenever two federal statutes allegedly conflict, "it is the duty of the courts, absent a clearly expressed congressional intention to the contrary," to harmonize the statutes if they are "capable of co-existence." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974); see, *e.g.*, *United States* v. *Estate of Romani*, 523 U.S. 517, 530-532 (1998). A merely "plausible" conflict between the statutes will not suffice to prevent harmonization. See *American Bank & Trust Co.* v. *Dallas County*, 463 U.S. 855, 868-869 (1983). Accordingly, when one statute speaks clearly to the issue at hand—as the Arbitration Act does as to the enforcement of arbitration agreements according to their terms—another statute must yield where that statute is ambiguous. See *Branch* v. *Smith*, 538 U.S. 254, 273-275 (2003) (plurality opinion); *West Virginia University Hospitals, Inc.* v. *Casey*, 499 U.S. 83, 100 (1991).

Respondents' attempt to avoid those fundamental principles of statutory interpretation is telling. And under those principles, this is an easy case. Respondents cannot hope to demonstrate that the NLRA contains a clear command precluding agreements to arbitrate on an individual basis. The general language in Section 7's residual clause—which gives employees the right to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U.S.C. 157—cannot do the "heavy lifting" required to evince a clear intent to preclude individual arbitration. *CompuCredit*, 565 U.S. at 100; see EY Br. 27-28. Nor does the legislative history of the NLRA evince such an intent, see EY Br. 29; respondents cite no contrary evidence on point, see, *e.g.*, Morris Br. 20-24; Lewis Br. 16. And individual arbitration does not fundamentally undermine the underlying purposes of the NLRA: namely,

minimizing industrial strife by encouraging self-organization and collective bargaining. See 29 U.S.C. 151; EY Br. 29-32.

Because the NLRA does not reveal a clear congressional command contrary to agreements to arbitrate on an individual basis, the Arbitration Act requires that the arbitration provisions at issue be "rigorously enforce[d] * * * according to their terms." *Italian Colors*, 133 S. Ct. at 2309 (internal quotation marks omitted); see, *e.g.*, *CompuCredit*, 565 U.S. at 104. That should be the end of the matter.

2. Instead of attempting to demonstrate the existence of a clear congressional command, respondents argue that their interpretation of the NLRA is the better one when the statute is read in isolation. Even if that were the correct approach—and it is not—respondents' interpretation founders.

a. Respondents argue that Section 7's residual clause—which gives employees the right to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection"—confers a nonwaivable right to invoke class or other collective procedures in disputes with employers over employment-related claims. See Morris Br. 14-24; NLRB Br. 11-21; Lewis Br. 10-25; Hobson Br. 10-23. But the text and context of Section 7 compel the opposite conclusion. The expressly enumerated rights in Section 7 include the rights to self-organize; form, join, or assist labor organizations; and bargain collectively. See 29 U.S.C. 157. Although respondents suggest otherwise, it is an unremarkable proposition that the residual clause should take meaning from the specific clauses it follows. See, *e.g.*, *Yates* v. *United States*, 135 S. Ct. 1074, 1086 (2015) (plurality opinion).

The right asserted by respondents differs in a key respect from the rights expressly enumerated in Section 7. Those rights all involve actions employees can undertake "on their own collective initiative." *NLRB* v. *Alternative Entertainment, Inc.*, 858 F.3d 393, 414-415 (6th Cir. 2017) (Sutton, J., concurring in part and dissenting in part). But collective-litigation procedures are different: "[t]he use of collective procedures is limited by statute, by the rules of the forum, and * * * by waiver." *Id.* at 415. Accordingly, while Section 7 may protect employees' collective efforts to decide to invoke whatever litigation opportunities are available, it does not guarantee any degree of success (or make any employer effort to defeat that success an unfair labor practice). Put differently, while Section 7 may protect employees who jointly approach the courtroom door, it does not reach into the courtroom and "create an affirmative right to use or pursue [particular] procedures." *Ibid.* That is especially true where, as here, the employees are pursuing individual causes of action for damages under statutes separate from the NLRA—which is hardly litigation for "mutual aid or protection." 29 U.S.C. 157; see EY Br. 42.

Respondents assert that, under the foregoing interpretation, Section 7 would offer no protection for any kind of concerted activity related to employees' actions in the courts. See Morris Br. 19; NLRB Br. 17; Lewis Br. 12-13; Hobson Br. 15. That does not follow. Section 7 may (or may not) protect employees who work together in other ways to pursue employment-related claims. See *Alternative Entertainment*, 858 F.3d at 414-415 (Sutton, J., concurring in part and dissenting in part). Section 7 may even protect employees' ability collectively to decide to avail themselves of individual arbitration simultaneously for the same basic claims. But whatever actions Section 7's residual clause protects, it assuredly

does not confer an affirmative right to invoke collective-litigation procedures created by a separate statute or rule—especially when the employees do not even argue that the statutes providing their causes of action demand collective relief.

b. Respondents contend that various decisions from this Court and the NLRB—most notably, the Court's decision in *Eastex, Inc.* v. *NLRB*, 437 U.S. 556 (1978)—have effectively answered the question presented. See, *e.g.*, NLRB Br. 12-15; Lewis Br. 10-11. Respondents vastly overread those decisions. Although the Court observed in *Eastex* that Section 7 "has been held" to protect employees' "resort to administrative and judicial forums" when "seek[ing] to improve working conditions," it said nothing about arbitration agreements and specifically reserved the question of "what may constitute 'concerted' activities in this context." 437 U.S. at 565-566 & n.15. In any event, this case does not generically involve "resort to administrative and judicial forums"; it involves a purported right to invoke particular procedural mechanisms once *inside* a judicial forum.

The other cases respondents cite are similarly inapposite. Each of those cases involved protected activity undertaken by employees themselves, without any need for approval by a court or agency: specifically, preparing, organizing, or filing a complaint in a court or administrative agency. None of those cases involved a claimed right to use particular procedures in practicing before the court or agency. See, *e.g.*, *NLRB* v. *Moss Planing Mill Co.*, 206 F.2d 557, 560 (4th Cir. 1953); *Harco Trucking, LLC*, 344 N.L.R.B. 478, 478 (2005); *United Parcel Service, Inc.*, 252 N.L.R.B. 1015, 1018 (1980); *Spandsco Oil & Royalty Co.*, 42 N.L.R.B. 942, 949-950 (1942).

c. Respondents further contend that it proves too much to say that Section 7 protects only activities the

employees can undertake on their own. After all, they note, even collective bargaining—an activity that Section 7 expressly protects—requires NLRB involvement; it is not something that employees "just *do*." Lewis Br. 14-15 (citation omitted).

That is true, but if anything it proves petitioners' point. Employees have the right to petition the NLRB to elect a bargaining representative, but it is up to the NLRB to determine how, based on applicable law, the election will proceed. See 29 U.S.C. 159. So too with collective-litigation procedures: employees may have the right to file a complaint and even to *request* collective proceedings, but it is up to the judge or arbitrator to determine how or if, based on applicable law, the case will advance. Employees have no right to *access* collective proceedings in the face of waiver or another valid defense, just as employees have no right to NLRB recognition of a bargaining unit in which the employees lack a "community of interest." *NLRB* v. *Action Automotive, Inc.*, 469 U.S. 490, 494 (1985) (citation omitted).

3. Perhaps recognizing that the NLRA alone does not get them where they want to go, the employee respondents (but not the NLRB) also invoke various provisions of the Norris-LaGuardia Act (NLGA). See Morris Br. 37-40; Lewis Br. 19-25; Hobson Br. 24-28. But those provisions are plainly not within the scope of the questions presented in any of the three cases. See 16-285 Pet. i; 16-300 Pet. i; 16-307 Pet. i; cf. 16-300 Resp. Br. in Support of Pet. i (proposing an additional question concerning those provisions, which the Court did not grant). And respondents' felt need to invoke a different statute only underscores that the NLRA does not provide the clear command this Court's cases require.

In any event, the NLGA adds nothing to respondents' arguments concerning the NLRA. As respondents

concede, "[t]he public policy declared in Section 2 of [the NLGA] provides the same right * * * that is contained in Section 7 of the NLRA." Morris Br. 50; see Lewis Br. 19-20; Hobson Br. 12. And Section 3 simply renders unenforceable contracts that conflict with that public policy. See 29 U.S.C. 103. If Section 7 of the NLRA does not override the Arbitration Act as applied here, then neither do Sections 2 and 3 of the NLGA.

Nor does Section 4 of the NLGA aid respondents. Section 4(d) protects the right of an employee to "aid[] any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court." 29 U.S.C. 104(d). But that provision merely contemplates "aiding" a person who is "participating or interested in" a labor dispute in court—not joining or participating in that dispute oneself through a collective-litigation mechanism.

While Section 4(d) of the NLGA protects activities such as fundraising, testifying, gathering evidence, and mobilizing support, it does not purport to grant employees any procedural rights they do not already possess. Nor does Section 4(d) (or any other provision of the NLGA) suggest that Congress intended "concerted activities for * * * mutual aid or protection" in the later-enacted NLRA to encompass broader rights to invoke collective-litigation procedures notwithstanding defenses; to the contrary, the more specific, but more modest, language of the NLGA suggests the opposite.

4. Respondents contend that Section 7 not only confers a right to invoke collective-litigation procedures, but that it renders that right nonwaivable. See Morris Br. 32-35; NLRB Br. 22-34; Lewis Br. 26-34; Hobson Br. 28-34. That would be an odd result. Labor law is premised upon bargaining, including the exchange of rights and privileges between employers and employees. That is

true in the collective context, see, *e.g.*, *NLRB* v. *City Disposal Systems, Inc.*, 465 U.S. 822, 837 (1984), and it is true in the individual context as well, see, *e.g.*, *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 258 (2009); *J.I. Case Co.* v. *NLRB*, 321 U.S. 332, 336-337 (1944).

Nothing in the NLRA suggests that an individual employee is somehow barred from waiving any right that Section 7 protects. Quite the opposite. As the government notes, if Section 7 can be read to include litigation conduct, it would only be because "the residual phrase can reasonably be construed to cover procedural matters as well as substantive ones." U.S. Br. 27. But procedural rights, such as access to collective-litigation procedures, are typically waivable. See *Italian Colors*, 133 S. Ct. at 2309, 2311 (class-action procedures under Rule 23); *Gilmer*, 500 U.S. at 32 (collective-action procedures under the ADEA); cf. NLRB Br. 52 (suggesting that collective-action procedures under the FLSA, identical to those at issue in *Gilmer*, are waivable).

Unsurprisingly, this Court has held that Section 7 rights that are not central to the collective-bargaining process are not absolute and can be waived. See EY Br. 45 (citing cases). Respondents attempt to distinguish those cases on the ground that they involved the waiver of a Section 7 right by a union, not an individual employee. See NLRB Br. 29-30; Lewis Br. 31 n.6; Hobson Br. 31. But that does not make the cases inapposite. As the Court has explained, a union does not have an absolute right to waive any Section 7 right; instead, a union's ability to waive a Section 7 right of the employees it represents depends on the nature of the right at issue. See *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 705-706 (1983); *NLRB* v. *Magnavox Co.*, 415 U.S. 322, 325-327 (1974).

So too in the context of waiver by an individual, whether a Section 7 right can be waived depends on the nature of the right in question. Here, respondents assert a right to invoke collective-litigation procedures available under non-NLRA statutes and rules. That is the very definition of a procedural right, which individuals "[a]re at liberty to waive." *Harris* v. *Avery Brundage Co.*, 305 U.S. 160, 164 (1938); see, *e.g.*, *Italian Colors*, 133 S. Ct. at 2310-2312; *United States* v. *Mezzanatto*, 513 U.S. 196, 200-203 (1995).

Respondents further contend that, in *J.I. Case*, *supra*, and *National Licorice Co.* v. *NLRB*, 309 U.S. 350 (1940), this Court held that employment contracts involving individual waivers of Section 7 rights gave rise to "unfair labor practice[s]" under Section 8(a)(1) of the NLRA. See Morris Br. 33; NLRB Br. 23-25; Lewis Br. 28-29; Hobson Br. 29-30. But those cases do not stand for the categorical proposition that waivers of Section 7 rights by individual employees are always improper. As the government has explained, *J.I. Case* and *National Licorice* both involved contracts "adopted to eliminate the [u]nion as the collective bargaining agency of [the] employees," U.S. Br. 29 (second alteration in original) (citation omitted); see *National Licorice*, 309 U.S. at 360; *J.I. Case*, 321 U.S. at 337. It is unsurprising that the Court held that *those* waivers were invalid, because the whole purpose of the NLRA is to protect employees' ability to bargain collectively. See 29 U.S.C. 151, 157; *Metropolitan Edison Co.*, 460 U.S. at 705-706.

The NLRB further argues that any Section 7 right to invoke collective-litigation procedures cannot be waived because it is a "public right." NLRB Br. 31. That is incorrect. As this Court has explained, "[i]t is *not* true that any private right that also benefits society cannot be waived." *New York* v. *Hill*, 528 U.S. 110, 117 (2000). In-

stead, only a private right that is *essential* to the public purpose of the provision creating the right is nonwaivable. See *ibid.* Any Section 7 right to invoke collective-litigation procedures could not be considered so central to the NLRA's stated purpose of minimizing industrial strife as to prohibit waiver. See pp. 12-13, *supra*.

Just as the NLRA contains no affirmative indication that it is creating a right to invoke collective-litigation procedures, so too does it reflect no "affirmative indication of Congress' intent to preclude waiver" of such a right. *Mezzanatto*, 513 U.S. at 201. There is thus no reason here to deviate from the principle that employees, like all other parties, have a presumptive right to waive legal protections intended for their benefit. Cf. Lewis Br. 53 n.10 (acknowledging that Section 7 "requires only that a generally available joint procedural device be made available to employees on the same terms as it is made available to everyone else").

5. Unwilling to shoulder their burden to show that the NLRA contains the requisite clear congressional command contrary to the Arbitration Act's mandate to enforce arbitration agreements according to their terms, and unable even to make the (legally irrelevant) showing that the NLRA in isolation creates a nonwaivable right to invoke collective-litigation procedures in employment-related disputes, respondents offer two last-ditch arguments.

a. The employee respondents argue that the Court should defer to the NLRB's interpretation of the NLRA under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See Morris Br. 30-32; Lewis Br. 25-26. Notably, however, the NLRB does not argue for such deference—presumably either because the NLRB's current interpretation is only of recent vintage, or because the NLRB might change its po-

sition before this litigation ends in light of ongoing changes in its membership.* But whatever position the NLRB takes by the time of oral argument, it is not entitled to deference on the question whether the NLRA contains the requisite clear congressional command to override the Arbitration Act (a statute the NLRB does not administer). See EY Br. 48-50; U.S. Br. 23-25.

b. Finally, some of the employee respondents (but again not the NLRB) invoke Section 15 of the Norris-LaGuardia Act, 29 U.S.C. 115, which expressly repeals any conflicting statutes. See Lewis Br. 50; Morris Br. 38-40; Hobson Br. 54. But that adds nothing to the analysis here. A provision that generally states that "all acts or parts of acts in conflict with this act are hereby repealed" "do[es] nothing more than recite an obvious truism" and "should legally be a nullity." 1A Norman J. Singer & J.D. Shambie Singer, *Sutherland on Statutes and Statutory Construction* §§ 20:26, 23:8, at 157, 445 (7th ed. 2014). The presumption against implied repeals still applies even in the presence of such a provision, because the provision does not expressly state which prior statutes it is repealing. See *id.* § 23:8, at 445-447; see *City of Savannah* v. *Kelly*, 108 U.S. 184, 188 (1883).

The same principles governing the harmonization of two potentially conflicting federal statutes thus apply to the NLGA just as they do to the NLRA. And because respondents acknowledge that the NLGA contains the same language and protects the same rights as the NLRA, see pp. 16-17, *supra*, the arbitration provisions at issue here are enforceable.

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* The President has nominated two new members to the five-member NLRB. One nominee was confirmed in August, and the other is currently awaiting Senate approval. The NLRB's general counsel, Richard Griffin, leaves office on November 4.

* * * * *

Respondents have failed to carry their burden of showing that the NLRA contains a clear command contrary to the Arbitration Act's command to enforce arbitration agreements according to their terms—including terms that require individual, rather than collective, arbitration. The NLRA does not evince a clear command contrary to agreements to arbitrate on an individual basis; it says nothing about collective-litigation procedures, and it does not confer a nonwaivable right to invoke those procedures. The Ninth Circuit erred by invalidating the arbitration provision at issue here, and its judgment should therefore be reversed.

Respectfully submitted.

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